Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., LAW ENFORCEMENT ALLIANCE OF AMERICA, INC., JANE DOES I and II, and JOHN DOES I, III, and IV

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Brady Act, P.L. 103-159, 107 Stat. 1536 (1993), established the national instant criminal background check system ("NICS") to determine whether persons may lawfully receive firearms from federally-licensed dealers. 28 C.F.R. § 25.9(b) provides that, in administering NICS, the FBI shall retain information for several months on persons who it determined may lawfully receive firearms. The issues are:

1. Whether the retention of information on such persons is unlawful under § 103(i) of the Act, which provides that no federal agency may (1) "require that any record" generated by NICS "be recorded at or transferred to a facility owned, managed, or controlled by the United States," or (2) use NICS "to establish any system for the registration of firearms, firearm owners, or firearm transactions," except of ineligible persons.

2. Whether the above retention of information is unlawful under 18 U.S.C. § 922(t)(2), which provides that, if a person may lawfully receive a firearm, NICS shall assign a unique number, provide the number to the dealer, and "destroy all records of the system with respect to the call" (other than the number and the date) and "all records of the system relating to the person or the transfer."

3. Whether deference is due to the Attorney General's interpretation of § 103(i) and § 922(t)(2) under *Chevron*'s "plain meaning" rule as refined in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000), particularly the presumption against "cryptic delegation."

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption. The two corporations which are petitioners here have no parent companies, have no stock, and hence have no publicly held company that owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the court of appeals, 216 F.3d 122, is printed in the Appendix ("App.") at 1a. The unreported judgment is at App. 43a. The unreported orders denying the petition for rehearing and petition for rehearing *en banc* are at App. 45a and 47a. The district court's unreported memorandum order denying the motion for preliminary injunction is at App. 49a. The district court's unreported memorandum and order granting the motion to dismiss is at App. 54a.

JURISDICTION

On July 11, 2000, the court of appeals rendered judgment affirming the district court's order dismissing the complaint. App. 43a. On October 26, 2000, the court of appeals denied the petitions for rehearing and for rehearing *en banc*. App. 45a, 47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993); 28 C.F.R. Part 25; 28 C.F.R. § 25.9 (as amended).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The complaint was filed on November 30, 1998, the effective date of § 102(b), the Permanent Provision of the Brady Act, P. L. 103-159, 107 Stat. 1536 (1993) ("the Act"). Plaintiffs alleged that 18 U.S.C. § 922(t)(2), §§ 103(h) & (i) of the Act, and § 621 of Title VI of P.L. 105-277, prohibited NICS from keeping records on persons who NICS determined may lawfully receive firearms. Plaintiffs challenged the validity of 28 CFR § 25.9(b), which allowed the FBI to keep such records for several months, and § 25.9(d), which authorized the FBI's State agents to keep such records indefinitely.[1]

The district court had jurisdiction under 28 U.S.C. § 1331. The court dismissed the complaint under F.R.Civ.P. 12(b)(6) and rendered judgment for defendant. App. 54a.

The court of appeals, in a 2 to 1 decision, affirmed. The majority found "nothing in the Brady Act that unambiguously prohibits temporary retention of information about lawful transactions" and deferred to the Attorney General. App. 2a. Dissenting, Judge Sentelle wrote that "by retaining instead of destroying [records], she [the Attorney General] and the system exceed the statutory grant of authority." App. 36a. Further, "the Attorney General is not only making such an unauthorized power grab, but is taking action expressly forbidden by Congress." *Id.* at 40a.

The court of appeals thereafter denied the petition for

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[1] Janet Reno, Attorney General, was the defendant-appellee in the courts below. John Ashcroft has been substituted for Janet Reno as the successor in office.

rehearing and petition for rehearing *en banc*.

Statement of Facts

Plaintiff National Rifle Association of America, Inc. ("NRA"), which had almost 3 million members at the time of filing, teaches firearms safety, promotes the shooting sports, and fosters the lawful use of firearms. Plaintiff Law Enforcement Alliance of America, Inc. ("LEAA") has over 65,000 members and supporters who are law enforcement professionals and citizens dedicated to making America safer. Six individual plaintiffs brought this action under "Doe" pseudonyms to protect their privacy recognized by the Act. Compl. ¶s 2-4.

NICS began operations on November 30, 1998, on which date the Doe plaintiffs and numerous NRA and LEAA members provided their identifications to federal firearms licensees (FFLs). The FFLs contacted NICS, which conducted background checks and informed the FFLs that firearms could lawfully be transferred to such persons. NICS kept records on such persons for six months and would continue keeping records on millions of NRA and LEAA members in the future who underwent NICS background checks. Compl. ¶s 23-32.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO DECIDE WHETHER THE FBI MAY KEEP RECORDS ON LAWFUL FIREARM TRANSFEREES AND BECAUSE THE COURT OF APPEALS DEPARTED FROM THE RULE AGAINST "CRYPTIC DELEGATION" SET FORTH IN *FDA v. BROWN & WILLIAMSON TOBACCO*

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court.

First, whether the FBI has authority to retain for several months the identities of those who, over time, constitute millions of lawful firearm owners is an important question of federal law that this Court should settle. The Brady Act was an historic compromise in which firearm purchasers submit to background checks in exchange for the assurance that, once cleared as law-abiding, the government will not compile any record of their identities. In violation of prohibitions against both retention of records on and registration of lawful firearm owners, plus a command to destroy records, the Attorney General promulgated a regulation that the FBI would keep the records for several months. The court of appeals decided that it could not understand these statutory provisions – terms like "record" being "inherently ambiguous." App. 13a. It thus held that it must accord *Chevron* deference to the agency, which is the very entity against which the privacy protections were enacted.

Treating such straightforward acts of Congress which are the product of historic compromises over a highly sensitive political issue in this manner can only serve to erode confidence in the executive and judicial branches by a large segment of the American population. "There is a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples v. United States*, 511 U.S. 600, 610 (1994), and "roughly 50 percent of American homes contain at least one firearm of some sort." *Id.* at 614 n.8. This Court should settle the important question of federal law of whether the FBI may retain the identities of law-abiding firearm purchasers.

Second, the opinion conflicts with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as refined in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000). Under *Chevron*, if Congress has clearly spoken to the issue, the court must apply the law without any deference to the agency's interpretation. *Brown & Williamson* adds the dispositive caveat that, even in the absence of statutory clarity, the courts should not recognize an implied delegation of power to an agency where the issue is of great public magnitude. As applied to FDA regulation of tobacco, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 120 S.Ct. at 1315. That is even more the case here, where clear statutory provisions prohibit the claimed agency power.

This case would give the Court an opportunity further to clarify the *Brown & Williamson* branch of the *Chevron* doctrine in the context of a statutory scheme which affects the privacy rights of millions of Americans.

I. THE NATIONAL INSTANT CHECK SYSTEM

The Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993), established NICS to determine whether persons may lawfully receive firearms from federal firearms licensees ("FFL"), i.e., firearm dealers. Section 103(b) provides:

> [T]he Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for *information, to be supplied immediately*, on whether receipt of a firearm

> by a prospective transferee would violate section 922 of title 18, United States Code, or State law. (Emphasis added.)

Section 102(b) created 18 U.S.C. § 922(t)(1), under which an FFL may not transfer a firearm to a non-licensee without having contacted NICS for a background check. The FFL may transfer the firearm after NICS provides a unique number, or three days pass and NICS has not notified the FFL that receipt of the firearm would be unlawful.

Section 922(t)(2) provides that, once a person passes the background check, NICS assigns a unique number, communicates the number to the FFL, and destroys all records regarding the call, the person, and the transfer (other than the number and the date). Section 103(i) of the Act prohibits NICS-generated records from being recorded at or transferred to any government facility, and prohibits any system of registration of lawful firearms owners or transactions.

NICS was created as part of the FBI by AG Order No. 2186-98, Final rule: National Instant Criminal Background Check System Regulation, 63 F.R. 58303 (Oct. 30, 1998), which promulgated 28 C.F.R. Part 25. Section 25.7 provides that an FFL must provide the following information to NICS about a proposed transferee: name, sex, race, date of birth, and State of residence. Also requested may be the Social Security number, military number, height, weight, eye and hair color, and place of birth.

NICS searches the databases and responds to the FFL with a "'proceed' response, if no disqualifying information was found," § 25.6(c)(1), i.e., the records "did not demonstrate that transfer of the firearm would violate federal or state law." § 25.2. Other responses are "delayed," if more research is necessary, and "denied," if firearm receipt would be unlawful.

Section 25.9(b) provides that NICS shall keep all information on each approved transferee for several months:

> The FBI will maintain an automated NICS Audit

> Log of all incoming and outgoing transactions that pass through the system.
>
> (1) The Audit Log will record the following information: type of transaction (inquiry or response), line number, time, date of inquiry, header, message key, ORI, and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN [NICS Transaction Number]). In cases of allowed transfers, all information in the Audit Log related to the person or the transfer, other than the NTN assigned to the transfer and the date the number was assigned, will be destroyed after not more than six months after the transfer is allowed. . . .
>
> (2) The Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system. . . . Information in the Audit Log pertaining to allowed transfers may only be used by the FBI for the purpose of conducting audits of the use and performance of the NICS. . . .

After this case was decided, a final rule changed the six-months retention period to ninety days and provided for the furnishing of the Audit Log to the Bureau of Alcohol, Tobacco and Firearms.[2] App. 97a. This amendment does not change the issues in this case.

"Audits" include criminal investigations, including to

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[2] Final rule, National Instant Criminal Background Check System Regulation, 66 F.R. 6470, 6474 (Jan. 22, 2001). On January 20, two days before the rule was published, President Bush issued a Regulatory Review Plan directing that "with respect to regulations that have been sent to the OFR [Office of the Federal Register] but not published in the Federal Register, withdraw them from OFR for review and approval." Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 F.R. 7702 (Jan. 24, 2001).

discover NICS use "for unauthorized purposes, such as running checks of people other than actual gun transferees"; and to "determine whether potential handgun purchasers or FFLs have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system." 63 FR at 58303. As for the Act's privacy provisions, "the statute does not specify a period of time within which records of approvals must be destroyed."[3] *Id.*

II. § 103(i) FORBIDS (1) RECORDATION OF NICS RECORDS AT GOVERNMENT FACILITIES AND (2) FIREARM-OWNER REGISTRATION

The "audit log" squarely violates the Act's prohibitions on NICS keeping any records of the identities of lawful firearm transferees. Section 103(i) of the Act provides:

> PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS-- No department, agency, officer, or employee of the United States may--
>
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

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[3] Some States have consented to perform the background check in lieu of the FBI. "POC (Point of Contact) means a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS." § 25.2. Section 25.9(d) exempts POCs from the destruction-requirement if the NICS-generated records "are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions." However, the Act neither recognizes POCs nor exempts them from the privacy provisions.

> (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code or State law, from receiving a firearm.

"When Congress enacts a statute designed to limit government intrusion in the private affairs of its citizens, the statutory provisions must be followed scrupulously." *United States v. Bacheler*, 611 F.2d 443, 447 (3d Cir. 1979), citing *United States v. Giordano*, 416 U.S. 505, 515 (1974). The above section was instrumental to the compromise in which Brady Bill supporters assured firearm owners that no Big Brother would watch them once they passed the background check. The "audit log" ruptures this commitment.[4]

A. NICS Records May Not be "Recorded at or Transferred to" a Government Facility

Under the plain meaning of § 103(i)(1), the information in the "audit log" constitutes "any record or portion thereof generated by the system established under this section," and its retention means that it has been "recorded at or transferred to" a government facility. Yet the lower court writes that it cannot understand those words (App. 13a):

> [S]ubsection (1) is not so clear. To begin with, the statute's prohibition against "record[ing]" a "record" is inherently ambiguous. What is a "record," when has it been "recorded," and what kind of "record" cannot be "recorded?" When a NICS operator enters the name of a prospective purchaser into the system, is that a

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[4] "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

"record?" Has it been "recorded?" If not, when does it become a "record" that cannot be "recorded?"[5]

This is "verbal know-nothingism that would render government by legislation quite impossible." *Deal v. United States*, 508 U.S. 129, 135 (1993). The panel created ambiguities that did not exist. Section 103(i) speaks unambiguously to "any" record. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' *Webster's Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Any information NICS receives and reduces to written form, whether on paper or electronically, is a "record." This is consistent with 18 U.S.C. § 922(t)(2)(C), which provides that once NICS approves the transfer, NICS shall "destroy *all* records of the system with respect to the call" (other than the unique number and the date) "and *all* records of the system relating to the person or the transfer." The lower court finds that this subsection, since it provides that a NICS operator enters a name on a computer to conduct the background check, renders § 103(i) meaningless. App. 13a. Yet Congress was not required to begin § 103(i) with the phrase "except as otherwise provided," for it passed the general rule and exceptions in the same bill.[6]

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[5] By contrast, no court has ever found any ambiguity in the criminal provisions of the Gun Control Act, *e.g.*, 18 U.S.C. § 922(m), requiring that "records" be kept by licensees.

[6] "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957). When two

Other exceptions to the general rule of § 103(i) include: records kept for three days following a "delayed" response, 18 U.S.C. § 922(t)(1)(B)(ii); records of denied transfers, § 922(t)(2); and retention of the unique number and date, § 922(t)(2)(C). The panel concludes: "These limitations on the obligation to destroy NICS records would have no meaning if subsection (1) barred recording of any information generated by the NICS." App. 14a. To the contrary, these exceptions are fully consistent with § 103(i)(1)'s ban on the keeping of records of *approved* transferees.[7]

The most apparent exception to the general rule of § 103(i) is for persons legally ineligible to receive firearms.[8] However, the panel asserts that the clause "except with respect to persons, prohibited [by law], from receiving a firearm," which appears at the end of § 103(i)(2), cannot be read to apply to § 103(i)(1), which therefore has no meaning. App. 14-15a. Yet both clauses are in the same sentence, and reading the "except with respect to" clause to refer to both (1) and (2) harmonizes these provisions.

The panel chooses the provision's most unlikely meaning to create further ambiguity: "Emphasizing the word 'require,' [the Attorney General] argues that the statute only prohibits the government from requiring third parties, such as

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provisions appear to conflict, a construction that renders one superfluous should be avoided. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

[7] *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (statutory terms must not be treated "essentially as surplusage--as words of no consequence.").

[8] That NICS may keep records on *ineligible* persons hardly implies that § 103(i)(1) does not prohibit records on *eligible* transferees. Indeed, records in which ineligible persons have falsely certified that they have no legal disabilities may be used to prosecute them. *See* 18 U.S.C. § 922(a)(6); 27 C.F.R. § 178.124(c)(1).

firearm dealers, from recording information at a government facility. . . . [T]he plausibility of her view highlights the statute's ambiguity." App. 16a. Yet § 103(i)(1) refers to (1) "any record," which could not be broader, (2) "generated by" NICS, which includes records created by the FBI while operating NICS, and (3) "recorded at or transferred to" a federal or state facility, and only NICS (not a dealer) could "record [a record] at" a NICS facility.

It was not until the appeal that the Attorney General invented the argument that § 103(i)(1) "does not implicate the Attorney General's retention of NICS records" and only prohibits "additional reporting requirements on firearms dealers." Br. of Appellee 12-13, 27. This was "nothing more than an agency's convenient litigating position." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988).[9]

A similar regulation was invalidated in *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), which applied *Chevron* and held:

> Congress could hardly have been more clear in its direction that "no other recordkeeping shall be required." While the information requested in the regulation may well be beneficial to BATF in its efforts to track firearm dispositions, the plain language of the statute makes clear that this is information that Congress did not wish licensees to be required to

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[9] In the district court, the Attorney General suggested that § 103(i)(1) means no more than, and is subsumed by, subparagraph (2). Dismiss Mem. 13-14. That violated the tenet that "it is our duty to give effect, if possible, to every clause and word of a statute, . . . rather than to emasculate an entire section, as the Government's interpretation requires." *United States v. Menasche*, 348 U.S. 528, 539 (1955). Further, § 103(i) uses the disjunctive "or," and "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . ." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979).

record.

In sum, § 103(i)(1) absolutely prohibits the retention of records on approved transferees, including the "audit log."

B. The Prohibition on "*Any* System for the Registration of" Firearm Owners or Transactions

Section 103(i)(2) provides that no department of the United States may "use the system established under this section to establish *any* system for the registration of firearms, firearm owners, or firearm transactions," except regarding ineligible persons. This clearly encompasses the "audit log." Once again, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5. "Register" means "a record or list of names . . ., often kept by an official appointed to do so," and "registration" means "(1) a registering or being registered (2) an entry in a register." *Webster's New World Dictionary* 1130 (1988).[10]

In the panel's agnostic view, the audit log is not a registration system because it "includes no addresses of persons approved to buy firearms, . . . nor even whether approved gun purchasers actually completed a transaction." *Id.* at 15. Yet a listing of identities is "registration,"[11] even sans address, and to

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[10] The courts do not "defer to the agency's choice among available dictionary definitions," *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218, 226 (1994), and in any event the Attorney General never cited a single dictionary definition in support of her argument. "Most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries." *Id.* at 227.

[11] *See HC Gun & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544, 546, 548 (5th Cir. 2000) (term "registration of firearms" includes ordinance requiring gun-show attendees to give names). The ordinary meaning of "registration" as a listing of personal identities is found in laws requiring sex offenders to register with police. *E.g., Russell v.*

conclude that the mass of persons who subject themselves to the approval process do not actually consummate the transaction assumes that they are just having a background check for the fun of it (and committing fraud) and not because they intend to receive a firearm.

The "audit log" constitutes registration as that term has been used since 1934 in the National Firearms Act, 26 U.S.C. § 5841(a), which provides regarding machineguns and other narrowly-defined "firearms" that "the Secretary shall maintain a central registry of all firearms in the United States," including, *inter alia*, the "identification and address of person entitled to possession of the firearm." The panel stated that "unlike the machine gun registry, information in the Audit Log is routinely purged after six months,"[12] and "the Audit Log therefore represents only a tiny fraction of the universe of firearm owners." App. 18a. Yet the law prohibits "*any* system of registration," without regard to duration or the percentage of owners currently registered.

The Attorney General claims to need the records to detect unlawful firearms transactions. *NRA v. Brady* rejected a similar agency argument that, without the regulation at issue, it would be difficult to detect unlawful dispositions of firearms by licensees. 914 F.2d at 484-85. The court explained:

> While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute. The policy

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Gregoire, 124 F.3d 1079, 1082 (9th Cir. 1997).

[12] Actually, 26 U.S.C. § 5841(c) provides only that "each firearm transferred shall be registered to the transferee," who could transfer the firearm to another in less than the "audit log" retention period. Further, § 5802 provides that "each year, each . . . dealer in firearms shall register with the Secretary," which is an annual, not a permanent, registration.

> arguments forwarded by the Secretary with respect to enforcement "should be directed to the Congress rather than to [the courts]."

Id. at 485, quoting *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963).

Once again, Congress expressed itself in the clearest of terms. The "audit log" constitutes registration and violates § 103(i)(2).

C. Legislative Background

The legislative history provides insights into the reasons for enactment of § 103(i). That provision was not included in H.R. 7, the Brady bill as passed in the House in 1991. However, while requiring a waiting period and the reporting of transfers to local police, it required police to destroy such reports within 30 days. House Report 102-47, 102d Cong., 1st Sess., 3 (1991). Rep. Roukema argued that the Brady bill "in no way provides for a system of national gun registration" because, when a transfer is approved, "law enforcement officers must destroy the information" in 30 days. Cong.Rec., 102d Cong., 1st Sess., H2836 (May 8, 1991).

In passing H.R. 7, the House defeated H.R. 1412, a substitute offered by Rep. Staggers. House Report 102-47 at 10. Yet the substitute contained the seeds of the Act's Permanent Provision, including the instant check and the equivalents of § 103(i) and § 922(t)(2). Cong.Rec., 102d Cong., 1st Sess., H2855-56 (May 8, 1991). Rep. Armey asked Staggers:

> Many firearm owners in my district are concerned that H.R. 1412 might authorize the Federal Government to compile a database of firearm purchase using information collected through the instantaneous computer check. Is it the gentleman's understanding that this legislation would not authorize the Federal

Government to keep these records?

Id. at H2828-29. Staggers replied, "yes, that is correct." The colloquy continued:

> Mr. Armey. In fact, does the gentleman not specifically intend that this legislation would prevent any Department . . . of the United States from compiling or recording any record obtained through the instantaneous check?
>
> Mr. Staggers. Yes; that is correct. In fact, this legislation is designed to prohibit the use of the hotline to establish any system for the registration of handguns, or handgun owners.

Id. at H2829.

Senator Hatch argued that "the Brady bill is a step towards gun registration." 135 Cong.Rec. S8253 (June 20, 1991). Senator Stevens added: "We have all heard, my generation did, about Hitler and how, in country after country, he read the gun registration laws and took the guns away from those who had them. This helped the Nazis take over Europe." *Id.* at S8266. Police and the federal government would "compile lists of handgun buyers," the goal of which was "national registration with the intent of confiscation of guns." *Id.* at S8267. Senator Craig referred to the bill as enacting "gun registration, [and] other unprecedented threats to the civil rights of American gun owners." *Id.* at S8268.

Senator Stevens offered an amendment to H.R. 7 which included the language of § 103(i). *Id.* at S8932, S9025 (June 27, 1991). Stevens explained:

> My amendment will not permit the registration of either a gun or a gun owner. In fact, the amendment *specifically prohibits keeping any records about lawful sales*. This will eliminate the possibility of an assembly of gun registration lists by local, State, or Federal authorities.

Id. at S8934 (June 27, 1991) (emphasis added).

The substitute failed, but the Dole-Metzenbaum compromise bill was introduced. *Id.* at S9075 ff. (June 28, 1991). It provided for an interim waiting period and a permanent federal instant check, including a § 103(i) provision. *Id.* at S9082, 9196. Senator Thurmond explained: "This instant check system will be used by licensed dealers to check the eligibility of purchasers of all firearms and *no records of legitimate purchasers may be kept.*" *Id.* at S9080 (emphasis added). The bill as amended passed the Senate. *Id.* at S9086. The Brady bill was then attached to the broader crime bill which was not enacted.

By the time the Brady bill was debated and passed in 1993, § 103(i) was in both House and Senate versions and, being non-controversial, was not debated. *Id.* at H9121 (Nov. 10, 1993), S16507 (Nov. 19, 1993).

The policy behind § 103(i) is far older than the Brady Act, for Congress has historically rejected registration. Handgun registration was rejected in 1934. National Firearms Act: Hearings Before the Committee on Ways and Means, U.S. House of Rep., 73rd Cong., 2d Sess., 58 (1934). The Property Requisition Act of 1941 prohibited any construction to "require the registration of any firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any manner the right of any individual to keep and bear arms."[13] P.L. 274, 55 Stat. 742 (1941).

Passage of the Gun Control Act of 1968 coincided with the defeat of all proposals to require firearm registration. 114

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[13] This was passed "in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties." Rept. No. 1120, House Com. on Military Affairs, 77th Cong., 1st Sess., 2 (Aug. 4, 1941). Rep. Paul Kilday, the sponsor, explained: "[R]egistration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone." 87 Cong.Rec. 7101 (1941).

Cong.Rec. 27422-56 (Sept. 18, 1968). The Firearms Owners' Protection Act of 1986 enacted a provision similar to § 103(i), *see* 18 U.S.C. § 926(a), about which Senator McClure explained: "The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments." 131 Cong.Rec. S9163-64 (July 9, 1985).

In sum, § 103(i) reflects Congress' historical rejection of the government keeping records on lawful firearms owners and transactions. The "audit log" is in clear violation of this legislative purpose.

III. RECORD DESTRUCTION REQUIREMENTS

A. § 922(t)(2) Requires Immediate Destruction

The "audit log" violates § 922(t)(2), which commands three duties to be carried out in sequence and immediately:

> If the receipt of a firearm would not violate section 922(g) or (n) or state law, the system shall–
>
> (A) assign a unique identification number to the transfer;
>
> (B) provide the licensee with the number; and
>
> (C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"Assign," "provide," and "destroy" are present tense, transitive verbs describing *seriatim* commands to be followed

one after the other.[14] The Act includes no grace period authorizing the Attorney General to ignore, for such period as she chooses, the destruction requirement, which applies when the unique number is provided to the licensee. Section 922(t)(2) mandates "destroy all records," not "retain all records for such time as the Attorney General may prescribe by regulation."[15]

The panel conceded that "the statute clearly requires NICS identification numbers to be both assigned and provided immediately." It added, however, that record destruction "plays no role in either authorizing or rejecting firearm transfers--the action that section 103(b) requires to be taken immediately." App. 10a. This ignores the statutory structure in which "destroy" follows "assign" and "provide" as part of the same continuous process. The panel reasoned that "section 922(t)(2)(C) does not say 'destroy immediately'; it says only 'destroy.'" App. 8a. Yet "destroy" (even without "immediate") and "retain" are irreconcilable. Every act or period of retention violates the command to destroy.

Congress knew how to allow a grace period when it so intended. The Act's Interim Provision required the licensee to furnish a copy of the transferee's statement to the local chief law enforcement officer ("CLEO"). 18 U.S.C. § 922(s)(1)(A)(IV). The CLEO was commanded to search all available records (i.e., manual and computerized) and to

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[14] "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*, the coupling of words together shows that they are to be understood in the same sense. . . ." *Neal v. Clark*, 95 U.S. 704, 708-09 (1877). *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps (the doctrine of *noscitur a sociis*)").

[15] In the district court, the Attorney General argued that "her decision concerning when to destroy records of such transfers is entirely discretionary." Mem. in Opposition to Motion for Prelim. Injunction 54.

ascertain the legality of the transaction within five days.[16] The CLEO "shall, within 20 business days after the date the transferee made the statement . . ., destroy the statement, [and] any record containing information derived from the statement . . . ."[17] § 922(s)(6)(B)(i). The Permanent Provision includes no similar grace period. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Interim Provision, an unfunded federal mandate, required local law enforcement to destroy all records (including paper) in a mere 20 days and allowed no "audit log" thereafter. Congress could not have intended to allow paid federal employees who could destroy computerized records with the push of a button to keep them for several months.

As passed, the Act contained the Senate version mandating simply "destroy," not the House version mandating "immediately destroy," which the House adopted, on motion by Rep. Gekas, without debate. 139 Cong.Rec. H9123 (Nov. 10, 1993), S16506 (Nov. 19, 1993). Senator Craig, expressing privacy concerns about the computerized instant check, explained about the Senate version: "It is a matter of law that they [the records] should not stand once the background check

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[16] 18 U.S.C. § 922(s)(2). *Printz v. United States*, 521 U.S. 98 (1997) declared that provision unconstitutional.

[17] "The Brady bill in no way provides for a system of national gun registration--quite the opposite. In every instance where a handgun sale is approved under Brady, law enforcement officers must destroy the information they've been provided within 20 days." 139 Cong.Rec. H9106 (Nov. 10, 1993) (statement of Rep. Roukema). "To help protect the privacy of legal purchasers, it [the Brady bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days." *Id.* at H9117 (statement of Rep. Hughes).

is done, so that there not be a fear that somebody were compiling a master list of guns and gunowners. That is not the intent and the law clearly understands that." *Id.* at S16328.

While the conference committee's version did not include the word "immediately," its report explained:

> The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

H.R. Conference Report No. 103-412, at 13 (Nov. 22, 1993). The report listed seven of these "differences" between the House and Senate versions. *Id.* at 13-14. The destruction requirement was not among them, meaning that it was among the "clerical corrections, conforming changes . . ., and minor drafting and clerical changes."

The panel found it weighty that the final version did not say "immediate." App. 10-11a. Yet "destroy" is facially inconsistent with "do not destroy."

The panel stated of bills that did not pass that "this post-Brady Act legislative activity reflects no unambiguous congressional intent to require immediate destruction of NICS records." App. 12a. Yet members of Congress may not support new bills because they believe that existing law already encompasses the subject of those bills. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (rejecting "reliance on Congress' subsequent failure to enact proposed legislation"). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675, 2001 U.S. LEXIS 640, *19 (2001) (quotation marks and citation omitted.).

In sum, § 922(t)(2) requires record destruction, which precludes record retention, regardless of its label.

B. § 103(h): Ensuring Privacy and Security

Having rendered the Act's "Thou shalt nots" lifeless, the panel upheld the regulation as an implied delegation under § 103(b) of the Act, which directed the Attorney General to establish NICS, and § 103(h), which provides that "the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section."[18] App. 19-25a. Yet the regulations authorize the *violation* of such privacy and security for several months.

Much is made of the need to audit the system for criminal investigatory purposes, such as catching licensees who run checks on persons other than firearm transferees. App. 24a. Senator Leahy was concerned "about giving every gun dealer in the country access to people's private lives" through NICS. *Id.* Yet Leahy was not a bill sponsor – he announced that "I will vote against the Brady bill," 139 Cong. Rec. S16328 (Nov. 19, 1993) – and never hinted that NICS could have "access to people's private lives" for several months. The panel fails to mention a single explanation by a member of Congress of § 103(i) or the destruction requirement.

The core interest in "privacy and security" protected by § 103(h) is that of lawful firearm transferees, as § 103(i) and the destruction requirement show. The panel sees this as only "one possible" interpretation. "[B]ecause the statute nowhere identifies precisely whose privacy interests are protected, we

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[18] *Independent Insurance Agents v. Board of Governors of Federal Reserve System*, 838 F.2d 627, 632 (2d Cir. 1988) explains:

> Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity.

defer to the Attorney General's interpretation . . . ." App. 24a. Thus, to protect the "privacy" interests of what must be a diminutive group about which the statute is silent, the privacy interests of every lawful firearm transferee are to be violated for several months.

Incredibly, the Attorney General saw the duties of destroying records and ensuring the privacy and security of information as "countervailing." 63 F.R. at 58304. To the contrary, only record destruction ensures the privacy and security of records of approved transferees. NICS need not destroy records on ineligible persons, who thus have no expectation that information about themselves will be kept private and secure from the government.

The Attorney General asserted in the district court that "plaintiffs have no privacy interest in the fact of their acquisition of a firearm." Dismiss Mem. 21. Yet the law recognizes similar privacy interests. *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992), stated in regard to unlawfully-seized taxpayer records:

> Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the taxpayer's privacy. A person's interest in maintaining the privacy of his "papers and effects" is of sufficient importance to merit constitutional protection.

The Attorney General argued as if Congress was concerned only with protection of privacy from unscrupulous FFLs who could run checks on persons who did not intend to purchase firearms, and an "audit log" is needed to ferret out such FFLs.[19] To the contrary, Congress sought to protect

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[19] An FFL who learns from NICS that a person may receive a firearm would have no adverse information on the person. If NICS advised the FFL not to proceed, the FFL would know only that the person has a

privacy from the government. Section § 922(t)(2) commands the Attorney General to "destroy all records," but the law entrusts the FFL with keeping full information on the transferee and the firearm.[20]

In sum, § 103(h) directs the Attorney General "to ensure the privacy and security" of information in NICS. Refusing to destroy the records violates the privacy of and endangers the security of this information.

C. The Prohibition on Use of Funds

Section 621, Title VI, P.L. 105-277 (1998), the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, provides: "None of the funds appropriated pursuant to this Act or any other provision of law may be used for . . . (2) any system to implement 18 U.S.C. 922(t) that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm."

This was enacted to negate AG Order No. 2158-98, Proposed rule: National Instant Criminal Background Check System Regulations, 63 F.R. 30430 (June 4, 1998), proposing the creation of 28 C.F.R. § 25.9(b)(1), under which NICS-generated records on approved transferees would not be destroyed until "after eighteen months." 63 F.R. at 30437.

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legal disability. That information may be available in far more detail at the local courthouse or on a criminal justice website. In any event, an FFL who misuses NICS is subject to prosecution and to revocation of access to NICS. 28 C.F.R. § 25.11.

[20] 18 U.S.C. § 923(g)(1)(A) (FFL shall maintain records of firearm dispositions); 27 C.F.R. § 178.124(c) (record includes transferee's identity and firearm description) & § 178.129(b) (record kept for 20 years).

Rep. Barr explained that "registration systems" were used "to confiscate firearms from citizens." Cong.Rec. H11652 (Oct. 20, 1998). The Act's destruction requirement "was intended to prevent the FBI or any other agency from using the system to keep a listing of everyone approved by the system to buy a firearm." *Id.* The proposed audit log "would violate the letter and spirit" of the Act.[21] *Id.*

Senator Stevens noted that NICS was intended "to protect the privacy of individual law-abiding gun owners," explaining: "One of the greatest concerns and legitimate fears of law abiding gun owners is that the federal government will create a federal gun owner registration system where law abiding gun owners exercise of their constitutional rights will be carefully monitored." *Id.* at S12742 (Oct. 21, 1998). Senator Lott stated that the FBI was prohibited from keeping NICS records on approved transfers "for any period of time." *Id.* Stevens added that § 922(t)(2) requires that record destruction "shall occur contemporaneously upon the system's approval of the firearms transfer" and the conveyance of the unique number to the dealer. *Id.* The Lott-Stevens colloquy concerned the conference committee version of § 621 that did not use the word "immediate" and that was enacted into law. *Id.* at S12742 (referring to report printed in House proceeding), H11075.

In sum, the Act commanded the Attorney General to destroy the records. When the Attorney General proposed an eighteen-month retention period, Congress precluded use of any funds for any system that did not destroy the records, once again without authorizing any grace period.

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[21] "This language is carefully crafted to ensure the FBI complies with all the provisions of the Brady Act . . . which prevent this system from turning into a gun registration scheme to restrict the second amendment rights of law-abiding Americans." *Id.*

IV. DEFERENCE IS PRECLUDED BY THE RULE AGAINST "CRYPTIC DELEGATION" SET FORTH IN *FDA v. BROWN & WILLIAMSON TOBACCO* (2000)

Like firearms, tobacco has been the subject of public controversy and hard-fought legislative compromises. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), aptly begins its discussion by stating:

> Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." . . . And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Id. at 1297, quoting *Chevron*, 467 U.S. at 842-843.

Congress directly spoke to the issue here in § 103(i) and in the record-destruction requirement. "Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.' . . . If Congress has done so, the inquiry is at an end . . . ." *Brown & Williamson*, 120 S.Ct. at 1300 (citation omitted). Yet the panel here saw ambiguities lurking in ordinary terms like "record" and "destroy," leaving the prohibitions containing these terms with no meaning. The existence of exceptions to the general rule prohibiting record retention led the panel to nullify the general rule. This is contrary to *Brown & Williamson*:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or

> ambiguity--of certain words or phrases may only become evident when placed in context. . . . It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ."

120 S.Ct. at 1300-01 (citations omitted).

No Brady Bill supporter expressed concern with any privacy violation other than the government's retention of records on approved transferees, and no one hinted that an "audit log" would be authorized. *See Brown & Williamson*, 120 S.Ct. at 1308 ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter."). Here, Congress enacted specific prohibitions on agency action. *Brown & Williamson* explains:

> Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *See Chevron*, 467 U.S. at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

120 S.Ct. at 1314. Given the always visible and sometimes rancourous debate on the question here, whether the agency may keep records on lawful transferees is hardly a detail that

Congress would have implicitly delegated to the agency.[22]

The provisions at issue are pillars of hard-won compromises, the core of which is the concession that every firearm transferee shall undergo a background check in exchange for the promise that the government shall not keep records on lawful transferees.[23] *Brown & Williamson* observes:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

120 S.Ct. at 1315.

As with § 103(i), the panel denied that section 922(t)(2)'s "'assign,' 'provide,' and 'destroy' directives implicitly restrict the Attorney General's authority to implement sections 103(b) and 103(h)." App. 30a. Yet *Brown & Williamson* forbids an implied delegation to retain transferee

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[22] "That theory [that a statute's ambiguity constitutes an implicit delegation] does not apply in the context of this statute taken historically and as a whole, because the context leaves no room to infer an implicit delegation, so there is no room for *Chevron* deference." *Gorbach v. Reno*, 219 F.3d 1087, 1093 (9th Cir. 2000) (en banc).

[23] *See Board of Governors, FRS v. Dimension Financial*, 474 U.S. 361, 373-74 (1986) ("the final language of the legislation may reflect hard-fought compromises. . . . The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer.").

identities:

> Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act -- a concept central to the FDCA's regulatory scheme -- but also ignore the plain implication of Congress' subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.[24]

120 S.Ct. at 1315. Here, the panel's strained narrowing of "record," "destroy," and "privacy and security" led it to infer a delegation in general provisions which make no such implication. Congress would not have delegated a power of such controversial nature in so cryptic a fashion.[25]

The reality here is that the Attorney General disagreed with the policy set by Congress and sought to impose her view of the public interest. *Brown & Williamson* admonishes:

> Nonetheless, no matter how "important, conspicuous, and controversial" the issue, . . . an administrative agency's power to regulate in the public interest must

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[24] "It is highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion -- and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate filing requirements." *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218, 231 (1994).

[25] "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-75 (1986).

> always be grounded in a valid grant of authority from Congress. And "'in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'"

120 S.Ct. at 1315 (citations omitted).

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 17, 2000
Decided July 11, 2000
No. 99-5270

National Rifle Association of America, Inc. et al.,
Appellants

v.

Janet Reno, Attorney General of the United States,
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 98cv02916)

Stephen P. Halbrook argued the cause for appellants. With him on the briefs was Richard E. Gardiner.

Michael S. Raab, Attorney, U.S. Department of Justice, argued the cause for appellee. On the brief were David W. Ogden, Acting Assistant Attorney General, Mark B. Stern, and Susan L. Pacholski, Attorneys, and Wilma A. Lewis, U.S. Attorney.

Before: Sentelle, Tatel and Garland, Circuit Judges.

Opinion for the Court filed by Circuit Judge Tatel.

Dissenting opinion filed by Circuit Judge Sentelle.

Tatel, Circuit Judge: The National Rifle Association challenges a Justice Department regulation providing for temporary retention of data generated during background checks of prospective firearms purchasers, as required by the Brady Handgun Violence Prevention Act. According to the NRA, the Brady Act requires immediate destruction of personal information relating to lawful firearm transactions. The Attorney General interprets the statute differently, arguing that temporary retention of data for at most six months is necessary to audit the background check system to ensure both its accuracy and privacy. Finding nothing in the Brady Act that unambiguously prohibits temporary retention of information about lawful transactions, and finding that the Attorney General has reasonably interpreted the Act to permit retention of such information for audit purposes, we affirm the district court's dismissal of the complaint.

I.

The Gun Control Act of 1968 makes it unlawful for certain individuals, including convicted felons, fugitives from justice, and illegal aliens, to possess firearms. See 18 U.S.C. § 922(g). The Brady Handgun Violence Prevention Act of 1993 required the Attorney General to establish a "national instant criminal background check system," known as the NICS, to search the backgrounds of prospective gun purchasers for criminal or other information that would disqualify hem from possessing firearms. See § 103(b), Pub. L. No. 103-159, 107 Stat. 1536. A computerized system operated by the FBI, the NICS searches for disqualifying information in three separate

databases: (1) the "NICS Index," containing records on persons known to be disqualified from possessing firearms under federal law; (2) the "National Crime Information Center," containing records on protective orders, deported felons, and fugitives from justice; and (3) the "Interstate Identification Index," containing criminal history records. 28 C.F.R. § 25.6(c)(1)(iii).

Before selling a weapon, firearm dealers must submit the prospective purchaser's name, sex, race, date of birth, and state of residence to the NICS operations center at the FBI. Id. § 25.7(a). If the firearm dealer is in a state that has elected to serve as a "point of contact" for NICS queries, the dealer must submit the inquiry to the relevant state agency. Id. § 25.6(d). Upon receiving such an inquiry, the FBI or state agency must immediately provide the gun dealer with one of three responses: (1) "proceed," if no information in the system indicates that a firearm transfer would be unlawful; (2) "denied," if the prospective purchaser may not legally possess a firearm; or (3) "delayed," if further research is necessary. Id. § 25.6(c)(1)(iv); Brady Act § 103(b), 107 Stat. at 1541.

A Justice Department regulation requires the FBI to retain records of all NICS background searches--including names and other identifying information about prospective gun purchasers--in an automated "Audit Log." 28 C.F.R. § 25.9(b). According to the regulation, the Audit Log is "a chronological record of system (computer) activities that enables the reconstruction and examination of the sequence of events and/or changes in an event." Id. § 25.2. The regulation's preamble describes the purpose of the Audit Log:

> By auditing the system, the FBI can identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, and protect against the invasions of privacy that would result from such misuse. Audits can also deter mine whether potential handgun purchasers or [gun dealers] have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system. The Audit Log will also allow the FBI to perform quality control checks on the system's operation by reviewing the accuracy of the responses given by the NICS record examiners to gun dealers.

National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58303, 58303-04 (1998) (hereinafter, NICS Regulation); see also 28 C.F.R. § 25.9(b)(2).

The regulation restricts use of the Audit Log. Information "pertaining to allowed transfers may only be used by the FBI for the purpose of conducting audits of the use and performance of the NICS." 28 C.F.R. § 25.9(b)(2). The Audit Log "may not be used by any department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions. The Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of the NICS data." Id.

The Notice of Proposed Rulemaking had called for retaining information relating to allowed transfers in the Audit Log for eighteen months. National Instant Criminal

Background Check System Regulations, 63 Fed. Reg. 30430, 30432 (proposed June 4, 1998). Declaring that "the general retention period for records ... in the NICS Audit Log should be the minimum reasonable period for performing audits on the system," the final regulation reduced the retention period to "in no event more than six months." NICS Regulation, 63 Fed. Reg. at 58304. The regulation's preamble states that "the FBI shall work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." Id. The Attorney General has since published a proposed rule that would shorten the retention period for records of allowed transfers to ninety days. National Instant Criminal Background Check System Regulation, 64 Fed. Reg. 10262, 10264 (proposed March 3, 1999).

When removed from the Audit Log, personal information relating to allowed transfers is destroyed. 28 C.F.R. § 25.9(b)(1). NICS records relating to denied firearm transfers are kept in the Audit Log for ten years, then transferred to a Federal Records Center for storage. Id. State agencies performing background checks in lieu of the FBI may retain information on allowed transfers if the records are "part of a record system created and maintained pursuant to independent state law regarding firearms transactions." Id. § 25.9(d)(1), (d)(2).

On the day the NICS regulation became effective, the National Rifle Association of America, joined by the Law Enforcement Alliance of America, Inc., and four John and Jane Does, filed suit in the U.S. District Court for the District of Columbia, arguing that temporary retention of NICS records of

allowed transfers violates three provisions of the Brady Act: section 922(t)(2)(C), requiring that the system "destroy" records of allowed transactions; section 103(i)(1), prohibiting the government from "requir[ing] that any [NICS] record ... be recorded at or transferred to a [government] facility"; and section 103(i)(2), prohibiting the government from "us[ing] the [NICS] system ... to establish any system for the registration of firearms." 107 Stat. at 1540, 1542. The complaint also alleged that the Attorney General has no authority to exempt NICS information retained by state agencies from the Brady Act's destruction requirement, even if that information is "part of a record system created and maintained pursuant to independent state law."

The Attorney General interpreted the Act differently, arguing that neither section 922(t)(2)(C) nor section 103(i)(1) prohibits temporary retention of NICS records, and that the Audit Log is not a "system for ... registration" within the meaning of section 103(i)(2). For authority to create the Audit Log, the Attorney General relied on her statutory obligations to establish a system capable of providing accurate information on the lawfulness of firearm transactions, see Brady Act, § 103(b), 107 Stat. at 1541, and to protect the privacy and security of the NICS. See Brady Act, § 103(h), 107 Stat. at 1542.

The district court, finding nothing in the Brady Act to require immediate destruction and the Attorney General's construction of the statute reasonable, dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Renewing the arguments it made in the district court, the NRA appeals. Our review is de novo. See, e.g., Brown v.

Plaut, 131 F.3d 163, 167 (D.C. Cir. 1997).

II.

Because the NRA challenges a statute administered by a government agency, we proceed in accordance with the familiar two-part test of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). We ask first "whether Congress has directly spoken to the precise question at issue," for if it has, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43.

If we find the statute silent or ambiguous with respect to the precise question at issue, we proceed to the second step of Chevron analysis, asking "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. At this point in our review, we afford substantial deference to the agency's interpretation of statutory language. See id. at 844.

We begin with the NRA's Chevron one argument that three provisions of the Brady Act unambiguously prohibit the Attorney General from retaining information about allowed transactions for any purpose, including auditing. In evaluating these arguments, we must not "confine [ourselves] to examining a particular statutory provision in isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context." FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1300 (2000). We must also "exhaust the traditional tools of statutory construction," Natural Resources Defense Council, Inc. v. Browner, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (internal quotation marks omitted), and

may examine the statute's legislative history in order to "shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." Id. at 1127 (internal quotation marks omitted). Finally, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision ... to an administrative agency." Brown & Williamson, 120 S. Ct. at 1301.

The first Brady Act provision the NRA relies on is section 922(t)(2):

> If receipt of a firearm would not [be unlawful], the system shall--
>
> (A) assign a unique identification number to the transfer;
> (B) provide the [firearms dealer] with the number; and
> (C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

18 U.S.C. § 922(t)(2). According to the NRA, when the statute says "destroy all records" it means "destroy all records immediately," not within six months. That is certainly one possible interpretation of section 922(t)(2)(C). At Chevron step one, however, the question is whether the statute unambiguously requires immediate destruction. We think the answer is no.

To begin with, section 922(t)(2)(C) does not say "destroy immediately"; it says only "destroy." When Congress wants to instruct an agency not only to take certain action, but

to take it immediately, it knows how to do so. For example, once an administrative agency determines whether a person requesting administrative records is entitled to receive them, Congress requires the agency to "immediately notify the person making such request of such determination." 5 U.S.C. § 552(a)(6)(A)(i). Similarly, the Equal Employment Opportunity Commission must "immediately refer" to the Merits System Protection Board any decision finding that the Board incorrectly interpreted governing law or issued a decision unsupported by record evidence. Id. § 7702(b)(5)(B). Congress even used the word "immediately" elsewhere in the Brady Act. Describing the NICS and the Attorney General's obligation to make information available to firearms dealers, Congress referred to a system of information "to be supplied immediately." Brady Act s 103(b), 107 Stat. at 1541. Yet when in section 922(t)(2)(C) Congress directed the Attorney General to "destroy" the information, it did not specify "immediately." The word's absence indicates to us that Congress has not unambiguously required immediate destruction of NICS records.

The NRA argues that, read in context, section 922(t)(2)(C) does in fact require immediate destruction of NICS records relating to allowed transfers. Its argument goes like this: (1) Congress intended the NICS to function as a database of "information, to be supplied immediately, on whether receipt of a firearm" would be prohibited by law. Brady Act § 103(b), 107 Stat. at 1541 (emphasis added). (2) Because under the statute, providing a NICS identification number signals a gun dealer that a transfer may proceed, see 18 U.S.C. § 922(t)(1)(B)(i), the "assign" and "provide" mandates of sections 922(t)(2)(A) and (B) must be executed immediately. (3) "The

'destroy' mandate [of section 922(t)(2)(C)] is part and parcel of this system, and compliance with that mandate must also be immediate." Appellants' Br. at 21.

We agree with the first two steps of the NRA's reasoning. The statute clearly requires NICS identification numbers to be both assigned and provided immediately. See Brady Act § 103(b), 107 Stat. at 1541; 18 U.S.C. § 922(t)(1)(B)(i); but cf. 28 C.F.R. § 25.6(c)(1)(ii) (providing identification numbers prior to conducting background searches). Destruction of NICS records, however, plays no role in either authorizing or rejecting firearm transfers--the action that section 103(b) requires to be taken immediately. NICS record examiners can complete the "assign" and "provide" tasks and respond immediately to gun dealers without immediately destroying the information. The "destroy" mandate is thus not "part and parcel" of "assign" and "provide."

Our conclusion that section 922(t)(2)(C) does not unambiguously require immediate destruction of NICS records finds support in the Act's legislative history. As reported to the House by the Judiciary Committee, the Brady bill contained no destruction requirement at all. See H.R. Rep. No. 103-344 (1993), reprinted in 1993 U.S.C.C.A.N. 1984. The obligation to destroy NICS records was added during floor debate. As passed by the House, the bill stated that the system shall "immediately destroy all records" of allowed transactions. See 139 Cong. Rec. H9098, 9123, 9144 (daily ed. Nov. 10, 1993). The Conference Committee, however, adopted the Senate's version of the destruction requirement, which did not contain "immediately." Compare 139 Cong. Rec. H9123 (daily ed. Nov. 10, 1993) (House version), with 139 Cong. Rec. S16506

(daily ed. Nov. 19, 1993) (Senate version). It was this version that both houses approved and the President signed.

To be sure, as the NRA points out, the Conference Report did not list the absence of "immediately" among the substantive differences between the House and Senate bills. See H.R. Conf. Rep. No. 103-412 (1993), reprinted in 1993 U.S.C.C.A.N. 2011. But this does not change the critical fact:

> The word "immediately," which had appeared in the House bill, is missing from the final Act. Although not necessarily reflecting congressional intent not to require immediate destruction, see Hammontree v. NLRB, 925 F.2d 1486, 1492 (D.C. Cir. 1991) (en banc), this omission supports our conclusion that congressional intent on the precise question before us--the sole focus of Chevron one inquiry--is at least ambiguous.

The parties debate the significance of subsequent legisla tive developments. An appropriations rider, expressly responding to the proposed Audit Log, would have conditioned NICS funding on the "immediate destruction of all information" relating to persons eligible to possess firearms. See 144 Cong. Rec. S8680 (daily ed. July 21, 1998) (proposed amendment no. 3233). As in the case of the Brady Act itself, the word "immediately" was deleted from the final act. See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 § 621(2), Pub. L. No. 105-277; see also An Act Making Consolidated Appropriations For the Fiscal Year Ending September 30, 2000, and For Other Purposes § 619(2), Pub. L. No. 106-113 (using the same language). Also, two bills that would have imposed criminal penalties on government

employees who retain NICS records for more than twenty-four hours were introduced but never passed. See No Gun Tax Act of 1998, H.R. 3949, 105th Cong.; Firearms Owner Privacy Act of 1998, S. 2175, 105th Cong. § 2. Heeding the Supreme Court's recent warning, "[w]e do not rely on Congress' failure to act" as dispositive evidence of congressional intent. Brown & Williamson, 120 S. Ct. at 1312. At the same time, this post-Brady Act legislative activity reflects no unambiguous congressional intent to require immediate destruction of NICS records. Indeed, the effort to require immediate destruction goes on: A bill now pending in the Senate once again calls for records of allowed transfers to be destroyed immediately. See Right to Bear Arms Privacy and Protection Act of 2000, S. 2270, 106th Cong. § 5(b).

Our dissenting colleague finds the absence of "immediately" in section 922(t)(2)(C) of no consequence because "[i]n no case has a court held that power has been granted to a federal agency by Congress's failure to enact a limitation to a directly contradictory statutory command." Slip Op. at 7 (Sentelle, J., dissenting). But the Attorney General does not claim authority for the Audit Log regulation from the absence of "immediately," nor from any other congressional failure to prohibit temporary retention of NICS records. Instead, the Attorney General relies on two separate grants of affirmative authority, i.e., sections 103(b) and 103(h) of the Brady Act. Before we can evaluate the reasonableness of the Attorney General's interpretation of those two sections, however, we must consider the NRA's remaining Chevron one arguments, i.e., that two other provisions of the Brady Act unambiguously prevent temporary retention of NICS information, for if the NRA is correct, "that is the end of the

matter." Chevron, 467 U.S. at 842. The two provisions appear in section 103(i):

> Prohibition Relating to Establishment of Registration Systems with Respect to Firearms.
>
> No department, agency, officer, or employee of the United States may--
>
> (1) require that any record or portion thereof generated by the [NICS] be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or (2) use the [NICS] to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited [by law], from receiving a firearm.

Brady Act § 103(i), 107 Stat. at 1542.

The NRA contends that the Audit Log represents a "clear violation" of subsection (1) because the Log "constitutes 'any record or portion thereof generated by' NICS, and it is 'recorded at or transferred to' a federal facility." Appellants' Br. at 11-12. Several considerations persuade us that subsection (1) is not so clear. To begin with, the statute's prohibition against "record[ing]" a "record" is inherently ambiguous. What is a "record," when has it been "recorded," and what kind of "record" cannot be "recorded?" When a NICS operator enters the name of a prospective purchaser into the system, is that a "record?" Has it been "recorded?" If not, when does it become a "record" that cannot be "recorded?"

In addition to the inherent ambiguity of these words, section 922(t)(2)(C) speaks of "destroy[ing] all records" relating to allowed transfers, apparently assuming that records may be created. Asked about this at oral argument, NRA counsel conceded that records could lawfully be kept for three business days while research is undertaken following a "delayed" response. See 18 U.S.C. § 922(t)(ii); 28 C.F.R. § 25.6(c)(1)(iv)(B). If the NRA's answer is correct--we think it is--then subsection (1) cannot categorically prohibit the government from making records of NICS information.

Moreover, if subsection (1) forbade the government from recording NICS information, it would directly conflict with other provisions of the Brady Act. Subsection (1) reaches "any [NICS] record or portion thereof," yet the Brady Act expressly authorizes the government to retain certain records of NICS transactions. For example, it permits retention of records relating to denied firearm transfers. See Brady Act § 103(i)(2), 107 Stat. at 1542 (forbidding use of the NICS to establish a firearm registry "except with respect to persons prohibited [by law] from receiving a firearm"); 18 U.S.C. § 922(t)(2) (requiring destruction of NICS records only if "receipt of a firearm would not [be unlawful]"). Even with respect to allowed transfers, section 922(t)(2)(C) permits retention of certain portions of NICS records. 18 U.S.C. § 922(t)(2)(C) (allowing permanent retention of NICS identification numbers and the dates those numbers were assigned). These limitations on the obligation to destroy NICS records would have no meaning if subsection (1) barred recording of any information generated by the NICS.

To avoid the first of these inconsistencies, the NRA

urges us to read into subsection (1) the clause "except with respect to persons, prohibited [by law], from receiving a firearm," which appears at the end of subsection (2) (the no firearm registry provision). "'The short answer [to this argument] is that Congress did not write the statute that way.'" Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Naftalin, 441 U.S. 768, 773 (1979)). The language applicable to both subsections (1) and (2)–"No department, agency, officer, or employee of the United States may"-- appears in the introductory text, not in the text of the subsections. Had Congress intended the language excepting denied transfers to apply to both subsections, it would have included that language in the introductory text as well. So written, the statute would have read: "If a firearm transfer would not be unlawful, no department, agency, officer, or employee of the United States may...." Indeed, that is just how Congress wrote section 922(t)(2), in which the phrase, "If receipt of a firearm would not [be unlawful]," precedes the separately enumerated requirements to "assign," "provide," and "destroy." Because similarly qualifying language appears neither in section 103(i)'s introductory text nor in subsection (1), we can only conclude that subsection (1) reaches, as its plain text indicates, "any record ... generated by the [NICS]."

Claiming its interpretation of subsection (1) does not conflict with section 922(t)(2)(C)'s requirement that transaction numbers be retained, the NRA argues that Congress can always "establish a general rule" and then "make exceptions." Appellants' Reply Br. at 9. Of course Congress may carve out particular exceptions to a general mandate. Indeed, section 922(t)(2)(C) does precisely that, requiring destruction of all records of allowed transfers "other than the identifying number

and the date the number was assigned." 18 U.S.C. § 922(t)(2)(C). Subsection (1), however, contains no similar qualification. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello, 464 U.S. at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (alteration in original)). Accordingly, we presume that when Congress excluded qualifying language from subsection (1), it did so intentionally.

Our conclusion that subsection (1) does not unambiguously prohibit the government from recording NICS information is reinforced by the fact that the Attorney General has advanced an alternative plausible interpretation. Emphasizing the word "require," she argues that the statute only prohibits the government from requiring third parties, such as firearm dealers, from recording information at a government facility. Had Congress intended subsection (1) to have the meaning the NRA gives it, the Attorney General argues, the statute presumably would have read: "No department, agency, officer, or employee of the United States may--(1) record any record or portion thereof generated by the [NICS] ... at a [government] facility . ..." That is precisely how Congress wrote subsection (2), which, unlike subsection (1), directly prohibits the government from using the system as a firearm registry; it does not prohibit the government from requiring that it be used as such. Though we owe no deference to the Attorney General's interpretation of statutory language at this stage of Chevron analysis, the plausibility of her view highlights the statute's ambiguity. See United States v. Nozfiger, 878 F.2d

442, 446-47 (D.C. Cir. 1989) (a statute is ambiguous if it can be read in more than one way).

This brings us to subsection (2), which forbids the government from "us[ing] the [NICS] system ... to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions." According to the NRA, the Audit Log regulation violates this subsection because the Audit Log is itself a "form of registration." Appellants' Br. at 15. But subsection (2) does not prohibit all forms of registration. It prohibits only "system[s] for the registration of firearms, firearm owners, or firearm transactions or dispositions." The Audit Log is not such a system. As designed by the Attorney General, it functions as a system for protecting the privacy of the NICS and for quality control. The Audit Log regulation expressly provides that "[i]nformation in the Audit Log pertaining to allowed transfers may only be used by the FBI for the purpose of conducting audits of the use and performance of the NICS." 28 C.F.R. § 25.9(b)(2). To enforce this restriction, "[t]he Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of the NICS data." Id.

The Audit Log, moreover, contains no information about "firearms" or "firearm transactions or dispositions." Nor does it contain a comprehensive list of "firearm owners." To be sure, the Log includes names of persons approved to buy firearms in the past six months, but as the Attorney General observes, "[t]he six-month snapshot of potential firearms transferees in the audit log reveals virtually nothing about the universe of firearms owners in the United States." Appellee's Br. at 26.

To illustrate the difference between the Audit Log and a firearms registry, the Attorney General calls our attention to the central registry of machine guns established by the National Firearms Act. See 26 U.S.C. § 5841. The machine gun registry contains information on all machine guns not possessed by the United States, including data on the weapons themselves, dates of registration, and the names and addresses of persons entitled to posses them. Id. § 5841(a)(1)-(3). Far less comprehensive, the Audit Log includes no addresses of persons approved to buy firearms, nor any information on specific weapons, nor even whether approved gun purchasers actually completed a transaction. And unlike the machine gun registry, information in the Audit Log is routinely purged after six months. The Audit Log therefore represents only a tiny fraction of the universe of firearm owners.

It does not follow, of course, that the Audit Log could never function as a firearm registry. But the Log's deficiencies as a system for registering firearms make it unlikely that it would be used for that purpose. Indeed, the NRA does not allege that the FBI has used the Audit Log for purposes other than "conducting audits of the use and performance of the NICS." 28 C.F.R. § 25.9(b)(2). The NRA's argument rests entirely on the fact that the Audit Log contains the names of persons approved to buy firearms in the past six months. This is not enough to convert the Log into a "system for the registration" of firearm owners. The Audit Log regulation is therefore not prohibited by section 103(i)(2).

III.

Having found nothing in either section 922(t)(2)(C) or

section 103(i) that unambiguously prohibits temporary retention of NICS records of allowed transactions for audit purposes, we turn to an examination of the affirmative grants of authority on which the Attorney General relies. She finds authority for the Audit Log regulation in two provisions of the Brady Act: section 103(b), which requires the Attorney General to establish a system capable of immediately providing information on whether a firearm transfer would be unlawful, and section 103(h), which requires the Attorney General to prescribe regulations to protect the system's security and privacy. Because neither provision speaks directly to the creation of an Audit Log, we evaluate the Attorney General's arguments pursuant to the second step of Chevron analysis, asking whether the Audit Log regulation reflects "a permissible construction of the statute." Chevron, 467 U.S. at 843.

"Such deference," the Supreme Court recently explained, "is justified because 'the responsibilities for assessing the wisdom of ... policy choices and resolving the struggle between competing views of the public interest are not judicial ones,' ... and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." Brown & Williamson, 120 S. Ct. at 1300 (quoting Chevron, 467 U.S. at 866). And, as we have said, "[a]s long as the agency stays within [Congress'] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." Arizona Public Service Co. v. EPA, 211 F.3d 1280, ___, 2000 WL 493047,*5 (D.C. Cir. 2000) (internal quotation marks omitted) (second alteration in original). So long as the agency's interpretation is reasonable, we uphold it "egardless whether there may be other reasonable, or even more reasonable, views." Allied Local and

Regional Manufacturers Caucus v. EPA, No. 98-1526, ___ F.3d ___, ___, 2000 WL 737750, *7 (D.C. Cir. 2000) (internal quotation marks omitted).

Before considering the Attorney General's interpretation of the Act, however, we must address the NRA's contention that "[n]o deference is due to the Attorney General in interpretation of statutory provisions intended to protect the privacy rights of private citizens from the Attorney General." Appellants' Br. at 30. In support of this fox-guarding-the-henhouse argument, the NRA cites Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System, 838 F.2d 627, 632 (2d Cir. 1988), in which the Second Circuit admonished: "Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency ... to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise...." We do not read Independent Insurance Agents to have added anything new to Chevron analysis, much less to have abandoned customary Chevron two deference. Courts always try not to defer to "dubious" agency arguments, or to "thwart" congressional intent. Mindful that Congress has acted to curtail the Attorney General's authority, we proceed with ordinary Chevron two analysis.

The first Brady Act provision on which the Attorney General relies is section 103(b): "[T]he Attorney General shall establish a national instant criminal background check system that any [gun dealer] may contact ... for information, to be supplied immediately, on whether receipt of a firearm by a

prospective transferee would [be unlawful]." Brady Act § 103(b), 107 Stat. at 1541. According to the Attorney General, "Congress would not have ordered her to establish the NICS without being able to ensure that the system [is] working," i.e., performing as Congress intended. Appellee's Br. at 18. As explained in the preamble to the NICS regulation:

> In order to meet her responsibility to maintain the integrity of Department systems ... the Attorney General must establish an adequate system of oversight and review. Consequently, the FBI has proposed to retain records of approved transactions in an audit log for a limited period of time solely for the purpose of satisfying the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system.

NICS Regulation, 63 Fed. Reg. at 58303. More specifically, "[a]udits can ... determine whether potential handgun purchasers or [gun dealers] have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system. The Audit Log will also allow the FBI to perform quality control checks on the system's operation by reviewing the accuracy of the responses given by the NICS record examiners to gun dealers." Id. at 58303-04. Reiterating this point, the March 1999 notice of proposed rulemaking states that "[a]udits of the use of the NICS are considered essential ... to ensure that the system is operating in the manner required by the Brady Act." National Instant Criminal Background Check System Regulation, 64 Fed. Reg. at 10263. The Attorney General's brief describes the function of the Audit Log in more

detail:

> The audit log enables the FBI to monitor the use of the NICS by firearms dealers, states serving as points of contact, and FBI personnel. The FBI also examines whether the FBI employees and contractors are making correct determinations as to whether potential transferees are disqualified, to ensure that "proceed" responses are not being supplied with regard to persons who are disqualified. Decisions to allow a firearm purchase are not fully automated, and thus officials must review and evaluate records before making a decision. Review of decisions made by NICS examiners is necessary to ensure that responsible individuals make correct decisions on whether a transfer is permissible, and to enable supervisors to provide additional training where necessary.

Appellee's Br. at 16 (internal citations omitted). In addition, the Audit Log is "vital to ensuring that the system (including its software) is working properly from a technical standpoint." Appellee's Br. at 17.

We think the Attorney General's position represents a reasonable interpretation of section 103(b)'s requirement that the NICS provide "information" on whether firearm transfers would be unlawful. The Audit Log, according to the Attorney General, is essential to ensuring the accuracy of that "information." Auditing enables the Attorney General to learn whether NICS operators and state points of contact are making accurate determinations. In short, the Attorney General uses the Audit Log to accomplish the very purpose of the Gun

Control and Brady Acts, i.e., to ensure that individuals not authorized to possess firearms are unable to purchase them.

Disputing the need for an Audit Log, the NRA contends that quality control measures can be undertaken contemporaneously with background checks. This may be true, but we have no way of knowing whether contemporaneous quality control would ensure that the NICS operates as Congress required. Nor is it our function to make that judgment. "[I]t is the agencies, not the courts, that have the technical expertise and political authority to carry out statutory mandates." General Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995).

Our conclusion that the Audit Log regulation represents a reasonable interpretation of section 103(b) finds support from the fact that auditing is not unusual for computerized systems like the NICS. For example, Justice Department regulations require audits of another computerized database, the Criminal History Record Information System, in order to "verify adherence" to applicable law. 28 C.F.R. § 20.21(e); see also id. § 20.1 (stating the purpose of the CHRI system). The regulations further require that "appropriate records ... be retained to facilitate such audits." Id. § 20.21(e). We thus have no reason to believe that the Attorney General maintains the Audit Log for some sinister purpose.

The Attorney General also relies on section 103(h): "[T]he Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system...." Brady Act § 103(h), 107 Stat. at 1542. The regulation's preamble explains how the Audit Log performs this function:

> "By auditing the system, the FBI can identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, and protect against the invasions of privacy that would result from such misuse." NICS Regulation, 63 Fed. Reg. at 58303.

During the debates on the Brady bill, Senator Leahy put the concern this way:

> I am concerned about giving every gun dealer in the country access to people's private lives.... My concerns are that access to the background check system may be abused.... [S]omebody is a neighbor and says, "I really don't care too much for those people who moved down the street. Check them out for me." I find that a little bit unsettling.

139 Cong. Rec. S16326, S16327 (daily ed. Nov. 19, 1993) (statement of Sen. Leahy).

The NRA offers a different interpretation of the statute's references to privacy and security. As the NRA sees it, the statute is concerned about the privacy of only lawful firearm purchasers. Appellants' Br. at 24. This certainly represents one possible, indeed, quite reasonable interpretation of section 103(h). But because the statute nowhere identifies precisely whose privacy interests are protected, we defer to the Attorney General's interpretation so long as it is reasonable. See Chevron, 467 U.S. at 843 & n.11. Here, the Attorney General, the official responsible for establishing and managing a nationwide database of personal information, has determined

that auditing is necessary to ensure that the system is not used for unauthorized purposes. Absent evidence that this concern is misplaced, we have no basis for second-guessing the Attorney General's judgment.

The NRA argues that the Attorney General lacks authority to investigate abuses involving gun dealers, pointing out that enforcement of the Gun Control Act (which the Brady Act amended) is vested in the Secretary of the Treasury. See Gun Control Act of 1968 § 103, Pub. L. No. 90-618, 82 Stat. 1213, 1226. The Brady Act, however, requires the Attorney General, not the Treasury Secretary, to prescribe regulations to protect the system's privacy.

The NRA next contends that use of the Audit Log to uncover system abuses would "necessarily require warrantless inspection of [gun dealers' records] not based on clear statutory grounds, and thus violate the Fourth Amendment." Appellants' Br. at 36. Urging us not to entertain this claim, the Attorney General argues that the NRA lacks standing to assert the Fourth Amendment rights of gun dealers, that the NRA's argument is unripe, and that the NRA failed to plead a Fourth Amendment claim in its complaint.

We think the Attorney General misconstrues the NRA's argument. As we understand it, the NRA asserts no current Fourth Amendment violation, but urges us to adopt an interpretation of the Brady Act that, according to the NRA, is necessary to avoid constitutional doubt. Although courts certainly must construe statutes to avoid "'grave and doubtful constitutional questions,'" Jones v. United States, 526 U.S. 227, 239 (1999) (quoting United States ex rel. Attorney

General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)), we have no basis for crediting the NRA's assertion that the Attorney General's interpretation of the Brady Act raises such questions. To begin with, the March 1999 proposed rulemaking explains that audits of firearm dealers will be performed in conjunction with the Bureau of Alcohol, Tobacco and Firearms' existing system of inspection. National Instant Criminal Background Check System Regulation, 64 Fed. Reg. at 10263. Unless that system already violates the Fourth Amendment--the NRA never alleges that it does--we see no basis for concluding that auditing the NICS would suddenly produce constitutional violations. Nor does the NRA identify any specific features of the auditing process that implicate constitutionally protected rights. In short, the NRA only speculates that the government could not uncover abuses of privacy involving the NICS without violating the Fourth Amendment.

Our conclusion that the Audit Log regulation reasonably implements sections 103(b) and 103(h) disposes of the NRA's argument that retention of NICS records for six months is unreasonable when compared with another section of the Brady Act providing for interim background checks during the five-year period the NICS was under development. Performed by state or local chief law enforcement officers, known as "CLEOs," these interim checks were to be completed within five business days if possible, 18 U.S.C. § 922(s)(2) (held unconstitutional in Printz v. United States, 521 U.S. 898 (1997)), and records of allowed transfers destroyed within twenty business days. 18 U.S.C. § 922(s)(6)(B)(i). Observing that "[t]he records generated under these [interim] provisions were paper, not computer records [like the NICS] capable of

instant destruction," the NRA asserts that "[i]t is impossible to comprehend Congress intending to allow ... federal employees who could destroy computerized records with the push of a button to keep them for six months." Appellants' Br. at 22.

The answer to the NRA's argument is that Congress has given the Attorney General far more responsibility for over-sight and implementation of the background check system than it had given CLEOs who performed interim checks. CLEOs were required to search "'whatever State and local recordkeeping systems [were already] available and ... a national system designated by the Attorney General." 1 8 U.S.C. § 922(s)(2). By comparison, section 103(b) required the Attorney General to establish a background check system capable of supplying information immediately. Brady Act § 103(b), 107 Stat. at 1541. The Brady Act gave CLEOs no affirmative oversight responsibilities. By comparison, section 103(h) required the Attorney General to "prescribe regulations to ensure the privacy and security of the information of the system." Brady Act § 103(h), 107 Stat. at 1542. Performing these additional section 103(b) and 103(h) duties is precisely why the Attorney General claims a need temporarily to retain NICS records. Having found the Attorney General's interpretation of these two provisions reasonable, we think it not at all "impossible to comprehend" that she would have authority to retain information longer than CLEOs.

The cases relied on by our dissenting colleague do not require a different result. In American Petroleum Institute v. EPA, 52 F.3d 1113 (D.C. Cir. 1995), we invalidated a regulation that implemented a statutory directive to reduce air pollution caused by reformulated gasoline. The regulation

required use of "renewable oxygenates," which, though conserving fossil energy resources and perhaps providing global warming benefits, "might possibly make air quality worse." Id. at 1119. For authority to require use of renewable oxygenates, the agency relied only on the reformulated gasoline statute and a general provision permitting it to "prescribe such regulations as are necessary to carry out [its] functions." 42 U.S.C. § 7601(a)(1).

Finding that the agency's fossil fuel and global warming objectives exceeded its authority, we observed that "[t]he sole purpose of the [reformulated gasoline] program is to reduce air pollution." API, 52 F.3d at 1119. Although, as EPA argued, the reformulated gasoline provision nowhere expressly prohibited the renewable oxygenate requirement, the dispositive fact was that nothing in the statute authorized it:

> In effect, EPA argues that because Congress has not explicitly limited its authority to promulgate a renewable oxygenate requirement, its interpretation of section 7545(k)(1) thus passes Chevron's first step, and this court must then defer to its expansive interpretation of the section under Chevron's second step. To suggest, however, "that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power (i.e. when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law ..., and refuted by precedent." Thus, we will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.

Id. at 1120 (quoting Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 671 (D.C. Cir.1994) (en banc) (first alteration in original)).

This case differs from API in two critical respects. First, the Attorney General claims no authority for the Audit Log regulation from the absence of an explicit limitation, such as the fact that the word "immediately" does not appear in section 922(t)(2)(C). Instead, she relies on sections 103(b) and 103(h), and it is her interpretation of those affirmative grants of authority--not the statute's failure to "expressly negate the existence of a claimed administrative power"--that implicates Chevron two. Thus, we do not "presume a delegation of power based solely on the fact that there is not an express withholding of such power." API, 52 F.3d at 1120. Instead, we conclude that the Attorney General has reasonably interpreted sections 103(b) and 103(h) to authorize NICS auditing--a question we could not even have reached without first determining whether section 922(t)(2)(C) expressly prohibits auditing.

Second, the Attorney General does not rely on a general provision empowering her to prescribe regulations necessary to carry out her statutory functions. She issued the Audit Log regulation to perform functions expressly authorized by sections 103(b) and 103(h). Far from "tak[ing] on additional powers," Slip Op. at 3 (Sentelle, J., dissenting), the Attorney General has merely carried out the tasks that Congress expressly delegated to her.

Equally distinguishable, Halverson v. Slater, 129 F.3d 180 (D.C. Cir. 1997), involved a challenge to a Department of Transportation regulation delegating certain responsibilities

under the Great Lakes Pilotage Act to the Saint Lawrence Seaway Development Corporation. For authority to issue the regulation, the Secretary had relied on general statutory authority to delegate secretarial responsibilities. The Secretary argued that a different statute, one that expressly authorized delegation of Pilotage Act responsibilities to Coast Guard officials, did not prohibit the delegation to the Corporation because nothing in that statute "expressly prohibit[ed] delegation of [these] powers and duties to a non-Coast Guard official." Id. at 186. Invalidating the delegation, we concluded that "the absence of an express proscription ... provides no green light to ignore the proscription necessarily implied by the limiting language of [the Coast Guard statute]." Id. at 187.

Our dissenting colleague, arguing that this case also involves "a statute conferring specific powers upon a cabinet officer,"--i.e., "assign," "provide," and "destroy"--concludes that the Audit Log regulation exceeds Congress' grant of authority. Slip Op. at 4 (Sentelle, J., dissenting). This case and Halverson, however, are quite different. The two statutes at issue in Halverson regulated precisely the same secretarial function--delegation of authority. Obviously the more specific statute controlled. But here, section 922(t)(2) and the two provisions relied on by the Attorney General concern entirely different functions. We thus have no reason to believe that section 922(t)(2)'s "assign," "provide," and "destroy" directives implicitly restrict the Attorney General's authority to implement sections 103(b) and 103(h).

The Supreme Court recently faced a similar situation in Christensen v. Harris County, No. 98-1167, Slip Op. (U.S. 2000). There, county employees challenged a county policy

requiring them to schedule paid leave as compensation for overtime in lieu of cash compensation. They argued that a provision of the Fair Labor Standards Act requiring that eligible employees be granted paid leave within a reasonable time of requesting it "provide[d] the exclusive means of utilizing accrued time." Id. at 4. In other words, because the FLSA did not expressly allow employers to require leave in lieu of cash compensation, the employees argued, the County could not do so. The Supreme Court disagreed. Acknowledging that "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode,'" the Court found that the "thing to be done" by the relevant provision was not the same task accomplished by the challenged policy. Id. at 6-7 (quoting Raleigh & Gaston R. Co. v. Reid, 13 Wall. 269, 270 (1872) (alteration in original)).

The statutory provision does not "se[t] forth the exclusive method" of implementing FLSA's compensatory leave provisions; it is instead "more properly read as a minimal guarantee" that employees may receive compensatory leave upon request. Id. at 7.

So too here. Section 922(t)(2) does not "set forth the exclusive method" by which the Attorney General may satisfy her statutory obligations; it is "more properly read as a minimal guarantee" that transaction numbers will be provided for approved transfers and that records relating to those transfers will be destroyed. Id. at 7. This the Attorney General has done. As to our dissenting colleague's discussion of Christensen, we do not rely on the case for the proposition that "legislative silence empowered a federal agency to act." Slip Op. at 5 n. 1 (Sentelle, J., dissenting); see supra at 10, 15, 23.

To sum up, keeping in mind Chevron two's highly deferential standard, we find that the Audit Log regulation represents a "permissible construction" of sections 103(b) and 103(h). Chevron, 467 U.S. at 843. We think it "common sense"--Brown & Williamson's Chevron one words that seem equally applicable at Chevron two--that Congress, having directed the Attorney General to establish a system for preventing disqualified persons from purchasing firearms, would expect the Attorney General to ensure that the system produces accurate information and guards against misuse. Indeed, by limiting retention of NICS information to "the minimum reasonable period for performing audits on the system," the Attorney General has obeyed the "destroy" command of section 922(t)(2)(C) while fulfilling her section 103(b) and 103(h) responsibilities. NICS Regulation, 63 Fed. Reg. at 58304.

IV.

We turn to the NRA's final argument: that the Attorney General has improperly exempted state agencies from the Brady Act's record destruction requirement. Because state and local agencies may serve as "points of contact" (POCs) for the purpose of processing NICS queries, see 28 C.F.R. § 25.2, gun dealers in POC states must submit NICS inquiries to the relevant state agency, not to the FBI. See id. § 25.6(d).

The Attorney General has determined that the Brady Act's destruction requirement does not apply to information retained by state governments that is "part of a record system created and maintained pursuant to independent state law." Id. § 25.9(d)(1), (d)(2). The NRA argues that the Attorney General lacks authority to create this exemption. But because

"[t]he NRA does not contend that states may not have their own background check systems (with their own record destruction or retention requirements) or that federal law preempts state law on this subject," Appellants' Reply Br. at 16, we understand the NRA to be claiming only that the Attorney General has no authority to exempt POCs from the Brady Act's destruction requirement with regard to information not maintained pursuant to state law.

If the regulation permitted retention of data not gathered pursuant to state law, we would agree with the NRA that it would violate the Brady Act's destruction requirement. But that is not how the Attorney General interprets the regulation. As she sees it, the regulation merely clarifies that state record retention requirements are not preempted by federal law:

> The reason for this clarification is to avoid interfering with state regulation of firearms. If a state is performing a gun eligibility check under state law, and state law requires or allows the retention of the records of those checks, the state's retention of records of the concurrent performance of a NICS check would not add any more information about gun ownership than the state already retains under its own law.

NICS Regulation, 63 Fed. Reg. at 58304. So long as the Attorney General interprets the regulation as permitting POCs to retain only data that would be kept pursuant to state law, the regulation does not conflict with the Brady Act. See Buffalo Crushed Stone, Inc. v. Surface Transp. Bd., 194 F.3d 125, 128 (D.C. Cir. 1999) ("An agency's interpretation of its own regulation merits even greater deference than its interpretation

of the statute that it administers.").

The judgment of the district court is affirmed.

So ordered.

Sentelle, Circuit Judge, dissenting: In 1993, as part of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) ("Brady Act"), Congress empowered the Attorney General to "establish a national instant criminal background check system" ("NICS") for determining whether purchasers of firearms from federal licensees are lawfully entitled to make such purchases. Id. § 103(b), 107 Stat. at 1541. Under the authorizing statute, with respect to legal transfers of firearms, the "system" initiated by the Attorney General is to "(A) assign a unique identification number to the transfer; (B) provide the licensee with the number; and (C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer." 18 U.S.C. § 922(t)(2) (1994). In purported reliance on the statutory provision, the Attorney General has promulgated regulations which require the Federal Bureau of Investigation ("FBI") to maintain an automated audit log of all incoming and outgoing transactions passing through the system including records of the "type of transaction ..., line number, time, date of inquiry, header, message key, ORI [originating agency identification number], and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN [NICS transaction

number])," inter alia. 28 C.F.R. § 25.9(b)(1) (1999). In the case of lawful transfers, the regulations require the FBI to retain such records in the audit log for six months after the date of each such transfer. See id. The National Rifle Association, the Law Enforcement Alliance of America, and various John and Jane Does (collectively "the NRA") sued to enjoin the operation of these regulations. The District Court granted summary judgment in favor of the Attorney General. Because the Attorney General in the promulgation of these regulations has not only exceeded the authority granted her under the cited section of the statute, but has also violated express prohibitions of other statutory sections, I would reverse.

I. Statutory Authorization

The Attorney General's authority to deal with the subject matter of preclearance of handgun purchasers depends entirely upon congressional grant. She does not and cannot claim any inherent power over the subject matter from constitutional or other sources. Therefore, unless the Brady Act empowers her to do what she has done, the regulations are invalid. Cf. American Petroleum Inst. v. United States Envtl. Protection Agency, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995) ("API"); Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 670-71 (D.C. Cir. 1994) (en banc).

The statute is unambiguously limited in the extent of the grant of authority to the Attorney General, and authority to be delegated to the NICS over transfers to citizens lawfully entitled to receive firearms. That authority is set forth in 18 U.S.C. § 922(t)(2) which, as expressed above, requires that the NICS "shall ... assign a unique identification number ... [;] provide the licensee with the number; and ... destroy all records of the

system with respect to the call (other than [the assigned number and the date])" along with "all records of the system relating to the person or the transfer." 18 U.S.C. § 922(t)(2) (emphasis added). Nothing in the Brady Act empowers the Attorney General to do more than these three things with respect to lawful transfers of firearms: (1) assign, (2) provide, and (3) destroy. When she, or the system to which she has delegated the authority, adds to those three by retaining instead of destroying, she and the system exceed the statutory grant of authority. The regulation requiring the retention in the "audit log" is such an excess; it is unlawful; and it should be enjoined.

The Attorney General's claimed authority for her unlawful accretion of power to the FBI and the NICS in the regulation is her "responsibility for administering the National Instant Criminal Background Check system." Br. for Appellee at 11. This reliance on general authority to administer an area of statutory regulation cannot sustain a federal actor's reaching beyond congressionally granted authority. We have repeatedly held that federal agencies cannot seize additional powers by substituting their own determination of the appropriate means for accomplishing statutory goals in place of that determined by the Congress.

For example, in API, the Environmental Protection Agency had been empowered by Congress to promulgate regulations for reformulated gasoline for use in "nonattainment areas." See 52 F.3d at 1115 (quoting 42 U.S.C. § 7545(k)(1) (1988 & Supp. V 1993)). The empowering statute provided that the regulations were to "require the greatest reduction in emissions of ozone forming volatile organic compounds ..., taking into consideration the cost of achieving such emission

reductions, any nonair-quality and other air-quality related health and environmental impacts and energy requirements." 42 U.S.C. § 7545(k)(1). The EPA included in its regulations the mandate for the inclusion of "renewable oxygenates" in the reformulated gasoline. As justification for this additional assertion of regulatory authority EPA asserted its duty to achieve other goals under the Clean Air Act. We struck down the challenged regulations, holding that the broad general grant of authority did not "authorize EPA to mandate the manner of compliance or the precise formula for compliance without additional explicit authority." API, 52 F.3d at 1121. Just so here. Congress has explicitly authorized the Attorney General to regulate the activities of citizens in a certain fashion. Her general authority to administer the statutory programs created by the Brady Act do not empower her to take on additional powers over citizens not delegated to her by the legislature.

Also, in Halverson v. Slater, 129 F.3d 180 (D.C. Cir. 1997), we considered the claimed authority of the Secretary of the Department of Transportation to delegate certain responsibilities under the Great Lakes Pilotage Act of 1960, 46 U.S.C. § 9301 et seq., to the St. Lawrence Seaway Development Corporation. By statute, the Secretary was empowered to "delegate the duties and powers conferred by [the relevant] subtitle to any officer, employee, or member of the Coast Guard...." 46 U.S.C. § 2104(a) (1994). That statute did not empower the Secretary to delegate such duties and powers to anyone outside the Coast Guard. The Secretary relied upon a general delegation grant in 49 U.S.C. § 322(b) to assert the authority to delegate that power to any officer or employee of the department. Once more, we held that general statutory goals and grants cannot "override the limiting

language" of a statute specifically empowering a federal agency to act. Halverson, 129 F.3d at 186, 187. Again, in the present controversy, we have before us a statute conferring specific powers upon a cabinet officer (the Attorney General), and an agency (the NICS) under that officer. General goals cannot add limitless power to the limited power delegated by Congress.

The Attorney General attempts to bolster her claim of power beyond the statutory grant by a repair to the analytical framework of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under the familiar rubric of that decision, when we review an agency's interpretation of a statute entrusted to the agency's administration, we undertake a two step analysis. We first "determine whether Congress has spoken to the precise question at issue." Halverson, 129 F.3d at 184 (quoting Natural Resources Defense Council, Inc. v. Browner, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (applying Chevron)). If so "that interpretation must be given effect." Id. If not, that is, "[i]f ... the statute is silent or ambiguous with respect to the specific issue, then the court will defer to a permissible agency construction of the statute." Id. The Attorney General contends that, under the second step of Chevron, we should uphold her assertion of the power to establish and retain records on lawful conduct of citizens where the words of the statute do not grant that power on the theory that her interpretation of the statute is a permissible one, that is to say a reasonable one. In fact, however, we should not even reach the second stage of Chevron. The absence of a grant of statutory power is not an ambiguity or silence on the question of whether Congress has granted such a power. We have disposed of that line of argument repeatedly in the past. As we stated in Railway Labor

Executives' Association:

> To suggest, as the [government actor] effectively does, that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power (i.e. when the statute is not written in 'thou shall not' terms), is both flatly unfaithful to the principles of administrative law ... and refuted by precedent.... Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well.

29 F.3d at 671 (citations omitted); see also Natural Resources Defense Council v. Reilly, 983 F.2d 259, 266 (D.C. Cir. 1993) ("[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of Chevron.") (emphasis added) (quoting Kansas City v. Department of Housing and Urban Dev., 923 F.2d 188, 191-92 (D.C. Cir. 1991)); API, 52 F.3d at 1120.[1]

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[1] Christensen v. Harris County, 120 S. Ct. 1655 (2000), cited by the majority, is not to the contrary. Indeed, the majority's analysis turns Christensen on its head. The Supreme Court not only did not decide that legislative silence empowered a federal agency to act, it did quite the opposite. The County, whose ability to control leave time scheduling was in question, appeared before the Court as the regulated entity asserting a limitation on federal power, not as the federal actor asserting a grant of power. See id. at 1659. Because the statute in question was silent or ambiguous on the issue, the regulated entity did not lose an ability that was inherently its own. See id. at 1660-62. That is, the silent or ambiguous

The statute is not ambiguous on whether it grants the Attorney General the power to retain the records which the statute empowers her to destroy. The statute simply does not grant her that power. Indeed, the denial of power is even stronger than that considered in the cited cases. Those statutes did not include "thou shall not" provisions. The Brady Act does. In the cases discussed above, the federal agency was seizing power not granted by Congress. Here, the Attorney General is not only making such an unauthorized power grab, but is taking action expressly forbidden by Congress.

II. "Thou Shall Not"

The Brady Act contains an express provision headed "Prohibition Relating to Establishment of Registration Systems with Respect to Firearms." Pub. L. No. 103-159, s 103(i), 107 Stat. at 1542. That section provides that

> No department, agency, officer, or employee of the United States may--
>
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof....

Id. By its clear words, this statute establishes that Congress has

---

statute did not empower the federal actor to do that which was not expressly
forbidden to it. Just so here.

unambiguously told the Attorney General that she shall not do what she is doing in the regulations. That is, she is forbidden to require the FBI, the NICS, or any other department, agency, officer, or employee of the United States to require that records generated by the NICS be recorded at or transferred to any facility. There is no exception for an audit log, and there is no exception for a six-month grace period. Congress has simply forbidden her to do it. She is doing it anyway. The regulation must fall. There is no ambiguity calling for the invocation of Chevron.

The Attorney General argues that "[w]ithout an audit log, the FBI would simply be incapable of achieving the level of oversight deemed essential by the Attorney General." Br. for Appellee at 17. I fail to see the relevance of that argument. Congress, not the Attorney General, makes the laws. Congress did not authorize the maintenance of an audit log in violation of its explicit command not to retain records. Neither did it empower the Attorney General to take its place in the making of law any time she deems essential a level of oversight neither required nor permitted by statute.

III. Conclusion

The Attorney General's ultimate fallback argument is that Congress and the statute could have but did not include the adverb "immediately" before the verb "destroy" when it commanded her to "destroy all records of the system" with respect to the contact in the case of lawful transfers of firearms. 18 U.S.C. § 922(t)(2). Specifically, she notes that it did not adopt an amendment offered in the House of Representatives to the effect of including that word. I fail to see that this avails her

anything. Courts are reluctant "to draw inferences from Congress' failure to act," Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988). In no case has a court held that power has been granted to a federal agency by Congress's failure to enact a limitation to a directly contradictory statutory command. Congress said, "destroy all records." Congress said, do not "require that any record ... be recorded." Brady Act s 103(i), 107 Stat. at 1542. The Attorney General asserts, "Congress did not say that I have to destroy the records immediately. Therefore I am empowered to retain the records." The Attorney General's position strikes me as reminiscent of a petulant child pulling her sister's hair. Her mother tells her, "Don't pull the baby's hair." The child says, "All right, Mama," but again pulls the infant's hair. Her defense is, "Mama, you didn't say I had to stop right now."

I do not think that the parent's command to the child is ambiguous, nor that of Congress to the Attorney General. I do not find the child's response reasonable; nor is that of the Attorney General.

I respectfully dissent from the decision of my colleagues to uphold the Attorney General's regulations.

MANDATE Pursuant to the provisions of Fed. R. App. Pro. 41(a)
ISSUED: 11 / 16/ 00
By: /s/ E. Brown Deputy Clerk
ATTACHED: __ Amending Order __ Opinion __ Order on Costs

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5270 **September Term, 1999**

National Rifle Association of America, Inc. et al.,
Appellants

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
JUL 11 2000
CLERK

v.

Janet Reno, Attorney General of the United States,
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 98cv02916)

BEFORE: SENTELLE, TATEL, and GARLAND, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Date: July 11, 2000

Opinion for the Court filed by Circuit Judge Tatel.
Dissenting opinion filed by Circuit Judge Sentelle.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5270 **September Term, 2000**

98cv02916

Filed On:

National Rifle Association of America, Inc. et al.,
Appellants

v.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED OCT 26 2000
CLERK

Janet Reno, Attorney General of the United States,
Appellee

BEFORE: Sentelle, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed August 21, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5270 September Term, 2000

98cv02916

Filed On:

National Rifle Association of America, Inc. et al.,
Appellants

V.

Janet Reno, Attorney General of the United States,
Appellee

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED OCT 26 2000
CLERK

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appellants' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing en banc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,

Plaintiffs,

v.

JANET RENO, Attorney General of the United States,

Defendant.

: Civil Action No. 98-2916 (JR)

FILED
JAN 27 1999
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM ORDER

This case involves the Justice Department's implementation of the National Instant Criminal Background Check System (NICS). At issue is the Justice Department's interpretation of a provision of the Brady Act requiring that, once a prospective gun transfer is approved, NICS must "destroy all records of the system with respect to the [background check] call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer." 18 U.S.C. § 922 (t)(2)(C). The Justice Department has announced its intention to retain NICS records for up to six months before destroying them, in order to ensure that NICS is functioning properly. Plaintiff's position is that the statute requires immediate

destruction, and they seek a preliminary injunction giving effect to that position. Because the statute does not on its face require immediate destruction of NICS records, and because the Justice Department's interpretation of the statute is reasonable, the plaintiff's likelihood of success on the merits is too slight to support a preliminary injunction.

FACTS

The Attorney General's regulations launching the National Instant Criminal Background Check System (NICS) went into effect on November 30, 1998. The regulations were implemented pursuant to the Brady Act, which authorized the Attorney General to establish a background check system for the transfer of guns and directed that it be operational within sixty months. Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, *codified at* 18 U.S.C. § 922 & note (Supp. 1998). The Brady Act directs the Federal Bureau of Investigation (FBI) and points of contact in each of the states (POC's) to implement NICS by determining whether a prospective firearms transferee is a convicted felon, a fugitive, an illegal alien, the subject of a domestic violence restraining order, a resident of a mental institution, or someone who is otherwise barred from possessing a firearm. *Id.* To satisfy the concerns of some, such as the NRA, who were concerned that NICS might become a national register of gun owners, the statute also directs that "the system shall . . . destroy all records of the system with respect to the call . . . ." 18 U.S.C. § 922 (t)(2)(C).

The Attorney General's regulations authorize the FBI to maintain records of approved firearm transactions on an "audit

log" for up to six months. *See* 63 Fed. Reg. 58,303 (1998) (to be codified at 28 C.F.R. pt. 25). The audit log includes the name, sex, race, date of birth, state of residence, and NICS transaction number of the prospective owner (but not the make, model, amount and serial number of the weapon (s) purchased, nor the address, phone number or social security number of the transferee). 63 Fed. Reg. 58,310 (1998) (to be codified at 28 C.F.R. § 25.7). The regulation states that the purposes of the audit log are "to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system." 63 Fed. Reg. 58,311 (1998) (to be codified at 28 C.F.R. § 25.9 (b)(2)).

ANALYSIS

The statue does not on its face require immediate destruction of NICS records. In fact, the statute is silent as to time, requiring only that the system "destroy all records of the system with respect to the call." The omission of a timetable from the statute presents a classic *Chevron* interpretation question, for "[i]f . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The Justice Department's interpretation of the statute is that it does not forbid the retention of some data elements for a brief period of time, under careful security, in order to perform quality control checks on the system's operations and to provide internal technical support for the software system. *See* Def. Ex. E, paragraph 9,

Declaration of John Yankowski, FBI Systems Deployment Unit Chief, Criminal Justice Information Systems Division. ("Most computer software programs that I am aware of use audit logs to ensure proper functioning and quality control. It is hard to conceive of a software system of this type operating without generating an audit log.")

It is true that the Department expects to make uses of the audit log that go beyond quality control and technical support. These other purposes can be characterized as law-enforcement purposes: determining, for example, whether gun dealers are running checks on people who have not applied to buy guns, or determining whether gun buyers have stolen the identities of unsuspecting people or have otherwise submitted false information. *See* 63 Fed. Reg. 58,303, 58,304 (1998). Neither the language of the Brady Bill nor any legislative history known to this Court suggests, however, that Congress meant to forbid the Department from employing a law enforcement tool that might serendipitously become available through NICS. It is hard to imagine that Congress intended the creation of a criminal background check system that could be abused without leaving any tracks of misuse.[2]

The Department's construction of the statute appears to be a "permissible" one --that is, "rational and consistent with the statue," *National Labor Relations Board v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987). It is not for

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[2] The next question – but one for another case – will presumably be whether an audit log that helps to identify an unlawful use of NICS may be used as evidence if it is more than six months old – or even if it is less than six months old.

this Court to second-guess that interpretation. It thus does not appear that plaintiffs have demonstrated a reasonable likelihood of success on the merits of this case. *See, e.g., Smith, Bucklin & Associates v. Sonntag*, 83 F.3d 476 (D.C. Cir. 1996).

A plaintiff making only a minimal showing of one factor of the preliminary injunction test must compensate with a strong showing in the other factors, *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). These plaintiffs have failed to do so. The only irreparable injury demonstrated is a theoretical loss of a privacy interest. There is no substantial evidence that the hardship to the plaintiff outweighs the cost to the government of dismantling what has taken sixty months to put together – the replacement of which would cost $1.5 million and would cause the system to be completely shut down for six months. Plaintiffs have not demonstrated that the public interest would be served by issuing an injunction.

It is accordingly this 26th day of January 1999 **ORDERED** that the motion for preliminary injunction [# 2] is **denied**.

/s/
JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 98-2916 (JR)
JANET RENO, Attorney General of the United States,	:	
Defendant.	:	FILED JUL -7 1999 NANCY MAYER WHITTINGTON, CLERK U.S. DISTRICT COURT

MEMORANDUM

In this case, the National Rifle Association challenges the Justice Department's implementation of the National Instant Criminal Background Check System (NICS), which was enacted pursuant to the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, codified at 18 U.S.C. §§ 922 & note (Supp. 1998) (the "Brady Law"). The challenged regulations provide that the FBI may retain NICS records for up to six months before destroying them. Plaintiffs assert that § 922 (t)(2) of the Brady Law and an appropriations rider, § 621 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 ("OCESAA"), Pub. L. 105-277 (Oct. 27, 1998), require immediate destruction of the records. Plaintiffs' application for a preliminary injunction was denied on

January 27, 1999, upon a finding that plaintiffs had not demonstrated a reasonable likelihood of success on the merits. Plaintiffs have appealed that ruling, and the Justice Department has moved to dismiss the complaint.

The briefs supporting and opposing the motion to dismiss neither change nor illuminate the picture presented by the motion for preliminary injunction. The merits dispute in this case centers on conflicting interpretations of § 922 (t)(2) of the Brady Law and the appropriations rider. Such a case requires application of the deferential standard of review established in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). Plaintiffs' application for a preliminary injunction was denied because Congress had not spoken directly to the question at issue and because defendant's construction of the Brady Law was permissible. *See* Memorandum Opinion, Jan. 27, 1999 at 5. Plaintiffs did not offer and have not offered any basis for departing from *Chevron*. All reasonable inferences from the alleged facts must be drawn in favor of plaintiffs, *see, e.g., Schuler v. United States*, 617 F.2d 605, 608, (D.C. Cir. 1979), but these plaintiffs have not alleged a "set of facts in support of [their] claims which would entitle [them] to relief." *Kowal v. MCI Communication Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

An appropriate order accompanies this memorandum.

/s/
JAMES ROBERTSON
United States District Judge

July 7, 1999

STATUTE

107 STAT. 1536 (Nov. 30, 1993)

PUBLIC LAW 103-159
103d Congress

An Act

To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I--BRADY HANDGUN CONTROL

SEC. 101.--SHORT TITLE.

This title may be cited as the "Brady Handgun Violence Prevention Act".

SEC. 102. FEDERAL FIREARMS LICENSEE REQUIRED TO CONDUCT CRIMINAL BACKGROUND CHECK BEFORE TRANSFER OF FIREARM TO NON-LICENSEE.

(a) INTERIM PROVISION.--

(1) IN GENERAL.--Section 922 of title 18, United States Code, is amended by adding at the end the

following:

"(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun to an individual who is not licensed under section 923, unless--

"(A) after the most recent proposal of such transfer by the transferee--

"(i) the transferor has--

"(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

"(II) verified the identity of the transferee by examining the identification document presented;

"(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the

statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

"(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

"(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

"(C)(i) the transferee has presented to the transferor a permit that--

"(I) allows the transferee to possess or acquire a handgun; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

"(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not

licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

"(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

"(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

"(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the

identification used;

"(B) a statement that the transferee--

"(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

"(ii) is not a fugitive from justice;

"(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

"(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

"(v) is not an alien who is illegally or unlawfully in the United States;

"(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

"(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

"(C) the date the statement is made; and

"(D) notice that the transferee intends to obtain a handgun from the transferor.

"(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

"(A) the chief law enforcement officer of the place of business of the transferor; and

"(B) the chief law enforcement officer of the place of residence of the transferee.

"(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

"(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

"(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

"(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

"(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

"(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

"(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

"(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

"(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

"(8) For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

"(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.".

(2) HANDGUN DEFINED.--Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

"(29) The term 'handgun' means--

"(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

"(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.".

(b) PERMANENT PROVISION.--Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

"(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

"(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

"(B)(i) the system provides the licensee with a unique identification number; or

"(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

"(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

"(2) If receipt of a firearm would not violate section 922 (g) or (n) or State law, the system shall--

"(A) assign a unique identification number to the transfer;

"(B) provide the licensee with the number; and

"(C) destroy all records of the system with

respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

"(A)(i) such other person has presented to the licensee a permit that--

"(I) allows such other person to possess or acquire a firearm; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

"(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because--

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement

officer (as defined in subsection (s)(8)); and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

"(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

"(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

"(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.".

(c) PENALTY.--Section 924(a) of title 18, United States Code, is amended--

(1) in paragraph (1), by striking "paragraph (2) or (3) of"; and

(2) by adding at the end the following:

"(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.".

SEC. 103. NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM.

(a) DETERMINATION OF TIMETABLES .--Not later than 6 months after the date of enactment of this Act, the Attorney General shall--

(1) determine the type of computer hardware and software that will be used to operate the national instant criminal background check system and the means by which State criminal records systems and the telephone or electronic device of licensees will communicate with the national system;

(2) investigate the criminal records system of each State and determine for each State a timetable by which the State should be able to provide criminal records on an on-line capacity basis to the national system; and

(3) notify each State of the determinations made pursuant to paragraphs (1) and (2).

(b) ESTABLISHMENT OF SYSTEM.--Not later than 60 months after the date of the enactment of this Act, the Attorney

General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.

(c) EXPEDITED ACTION BY THE ATTORNEY GENERAL.--The Attorney General shall expedite--

(1) the upgrading and indexing of State criminal history records in the Federal criminal records system maintained by the Federal Bureau of Investigation;

(2) the development of hardware and software systems to link State criminal history check systems into the national instant criminal background check system established by the Attorney General pursuant to this section; and

(3) the current revitalization initiatives by the Federal Bureau of Investigation for technologically advanced fingerprint and criminal records identification.

(d) NOTIFICATION OF LICENSEES.--On establishment of the system under this section, the Attorney General shall notify each licensee and the chief law enforcement officer of each State of the existence and purpose of the system and the means to be used to contact the system.

(e) ADMINISTRATIVE PROVISIONS.--

(1) AUTHORITY TO OBTAIN OFFICIAL INFORMATION.--Notwithstanding any other law, the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, as is necessary

to enable the system to operate in accordance with this section. On request of the Attorney General, the head of such department or agency shall furnish such information to the system.

(2) OTHER AUTHORITY.--The Attorney General shall develop such computer software, design and obtain such telecommunications and computer hardware, and employ such personnel, as are necessary to establish and operate the system in accordance with this section.

(f) WRITTEN REASONS PROVIDED ON REQUEST.--If the national instant criminal background check system determines that an individual is ineligible to receive a firearm and the individual requests the system to provide the reasons for the determination, the system shall provide such reasons to the individual, in writing, within 5 business days after the date of the request.

(g) CORRECTION OF ERRONEOUS SYSTEM INFORMATION.--If the system established under this section informs an individual contacting the system that receipt of a firearm by a prospective transferee would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, the prospective transferee may request the Attorney General to provide the prospective transferee with the reasons therefor. Upon receipt of such a request, the Attorney General shall immediately comply with the request. The prospective transferee may submit to the Attorney General information to correct, clarify, or supplement records of the system with respect to the prospective transferee. After receipt of such information, the Attorney General shall immediately consider the information, investigate the matter further, and correct all erroneous Federal records relating to the prospective transferee and give notice of the error to any Federal department or

agency or any State that was the source of such erroneous records.

(h) REGULATIONS.--After 90 days' notice to the public and an opportunity for hearing by interested parties, the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section.

(i) PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS.--No department, agency, officer, or employee of the United States may--

(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.

(j) DEFINITIONS.--As used in this section:

(1) LICENSEE.--The term "licensee" means a licensed importer (as defined in section 921(a)(9) of title 18, United States Code), a licensed manufacturer (as defined in section 921(a)(10) of that title), or a licensed dealer (as defined in section 921(a)(11) of that title).

(2) OTHER TERMS.--The terms "firearm", "handgun", "licensed importer", "licensed manufacturer", and "licensed dealer" have the meanings stated in section 921(a) of title 18, United States Code,

as amended by subsection (a)(2).

(k) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated, which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, such sums as are necessary to enable the Attorney General to carry out this section.

SEC. 104. REMEDY FOR ERRONEOUS DENIAL OF FIREARM.

(a) IN GENERAL.--Chapter 44 of title 18, United States Code, is amended by inserting after section 925 the following new section:

"§ 925A. Remedy for erroneous denial of firearm

"Any person denied a firearm pursuant to subsection (s) or (t) of section 922--

"(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

"(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922, may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be

corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.".

(b) TECHNICAL AMENDMENT.--The chapter analysis for chapter 44 of title 18, United States Code, is amended by inserting after the item relating to section 925 the following new item:

"925A. Remedy for erroneous denial of firearm.".

SEC. 105. RULE OF CONSTRUCTION.

This Act and the amendments made by this Act shall not be construed to alter or impair any right or remedy under section 552a of title 5, United States Code.

SEC. 106. FUNDING FOR IMPROVEMENT OF CRIMINAL RECORDS.

(a) USE OF FORMULA GRANTS.--Section 509(b) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3759(b)) is amended--

(1) in paragraph (2) by striking "and" after the semicolon;

(2) in paragraph (3) by striking the period and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(4) the improvement of State record systems and the sharing with the Attorney General of all of the records described in paragraphs (1), (2), and (3) of this subsection and the records required by the Attorney

General under section 103 of the Brady Handgun Violence Prevention Act, for the purpose of implementing that Act.".

(b) ADDITIONAL FUNDING.--

(1) GRANTS FOR THE IMPROVEMENT OF CRIMINAL RECORDS.--The Attorney General, through the Bureau of Justice Statistics, shall, subject to appropriations and with preference to States that as of the date of enactment of this Act have the lowest percent currency of case dispositions in computerized criminal history files, make a grant to each State to be used--

(A) for the creation of a computerized criminal history record system or improvement of an existing system;

(B) to improve accessibility to the national instant criminal background system; and

(C) upon establishment of the national system, to assist the State in the transmittal of criminal records to the national system.

(2) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated for grants under paragraph (1), which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, a total of $200,000,000 for fiscal year 1994 and all fiscal years thereafter.

TITLE II--MULTIPLE FIREARM PURCHASES TO STATE AND LOCAL POLICE

Sec. 201. REPORTING REQUIREMENT.

Section 923(g)(3) of title 18, United States Code, is

amended--

(1) in the second sentence by inserting after "thereon," the following: "and to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other disposition took place,";

(2) by inserting "(A)" after "(3)"; and

(3) by adding at the end thereof the following:

"(B) Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received. No later than the date that is 6 months after the effective date of this subparagraph, and at the end of each 6-month period thereafter, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph."

TITLE III--FEDERAL FIREARMS LICENSE REFORM

Sec. 301. SHORT TITLE.

This title may be cited as the "Federal Firearms License Reform Act of 1993".

Sec. 302. PREVENTION OF THEFT OF FIREARMS.

(a) COMMON CARRIERS.--Section 922(e) of title 18, United States Code, is amended by adding at the end the following: "No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm."

(b) RECEIPT REQUIREMENT.--Section 922(f) of title 18, United States Code, is amended--

(1) by inserting "(1)" after "(f)"; and

(2) by adding at the end the following new paragraph:

"(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm."

(c) UNLAWFUL ACTS.--Section 922 of title 18, United States Code, as amended by section 102, is amended by adding at the end the following new subsection:

"(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce."

(d) PENALTIES.--Section 924 of title 18, United States Code, is amended by adding at the end the following new

subsection:

"(i)(1) A person who knowingly violates section 922(u) shall be fined not more than $10,000, imprisoned not more than 10 years, or both.

"(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection."

Sec. 303. LICENSE APPLICATION FEES FOR DEALERS IN FIREARMS.

Section 923(a)(3) of title 18, United States Code, is amended--

(1) in subparagraph (A), by adding "or" at the end;

(2) in subparagraph (B) by striking "a pawnbroker dealing in firearms other than" and inserting "not a dealer in";

(3) in subparagraph (B) by striking "$25 per year; or" and inserting "$200 for 3 years, except that the fee for renewal of a valid license shall be $90 for 3 years."; and

(4) by striking subparagraph (C).

REGULATIONS

28 Code of Federal Regulations Part 25

DEPARTMENT OF JUSTICE INFORMATION SYSTEMS

Subpart A-The National Instant Criminal Background Check System

Sec.

25.1 Purpose and authority.
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AUTHORITY: Pub. L. 103-159, 107 Stat. 1536.

Subpart A-The National Instant Criminal Background Check System

Sec. 25.1 -- Purpose and authority.

The purpose of this subpart is to establish policies and procedures implementing the Brady Handgun Violence

Prevention Act (Brady Act), Public Law 103-159, 107 Stat. 1536. The Brady Act requires the Attorney General to establish a National Instant Criminal Background Check System (NICS) to be contacted by any licensed importer, licensed manufacturer, or licensed dealer of firearms for information as to whether the transfer of a firearm to any person who is not licensed under 18 U.S.C. 923 would be in violation of Federal or state law. The regulations in this subpart are issued pursuant to section 103(h) of the Brady Act, 107 Stat. 1542 (18 U.S.C. 922 note), and include requirements to ensure the privacy and security of the NICS and appeals procedures for persons who have been denied the right to obtain a firearm as a result of a NICS background check performed by the Federal Bureau of Investigation (FBI) or a state or local law enforcement agency.

Sec. 25.2 -- Definitions.

Appeal means a formal procedure to challenge the denial of a firearm transfer.

ARI means a unique Agency Record Identifier assigned by the agency submitting records for inclusion in the NICS Index.

ATF means the Bureau of Alcohol, Tobacco, and Firearms of the Department of Treasury.

Audit log means a chronological record of system (computer) activities that enables the reconstruction and examination of the sequence of events and/or changes in an event.

Business day means a 24-hour day (beginning at 12:01 a.m.) on which state offices are open in the state in which the proposed firearm transaction is to take place.

Control Terminal Agency means a state or territorial criminal justice agency recognized by the FBI as the agency responsible for providing state-or territory-wide service to criminal justice users of NCIC data.

Data source means an agency that provided specific information to the NICS.

Delayed means that more research is required prior to a NICS "Proceed" or "Denied" response. A "Delayed" response to the FFL indicates that it would be unlawful to transfer the firearm until receipt of a follow-up "Proceed" response from the NICS or the expiration of three business days, whichever occurs first.

Denied means denial of a firearm transfer based on a NICS response indicating one or more matching records were found providing information demonstrating that receipt of a firearm by a prospective transferee would violate 18 U.S.C. 922 or state law.

Denying agency means a POC or the NICS Operations Center, whichever determines that information in the NICS indicates that the transfer of a firearm to a person would violate Federal or state law, based on a background check.

Dial-up access means any routine access through commercial switched circuits on a continuous or temporary basis.

Federal agency means any authority of the United States that is an "Agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

FFL (federal firearms licensee) means a person licensed by the ATF as a manufacturer, dealer, or importer of firearms.

Firearm has the same meaning as in 18 U.S.C. 921(a)(3).

Licensed dealer means any person defined in 27 CFR 178.11.

Licensed importer has the same meaning as in 27 CFR 178.11.

Licensed manufacturer has the same meaning as in 27 CFR 178.11.

NCIC (National Crime Information Center) means the nationwide computerized information system of criminal justice data established by the FBI as a service to local, state, and Federal criminal justice agencies.

NICS means the National Instant Criminal Background Check System, which an FFL must, with limited exceptions, contact for information on whether receipt of a firearm by a person who is not licensed under 18 U.S.C. 923 would violate Federal or state law.

NICS Index means the database, to be managed by the FBI, containing information provided by Federal and state agencies about persons prohibited under Federal law from receiving or possessing a firearm. The NICS Index is separate and apart from the NCIC and the Interstate Identification Index (III).

NICS Operations Center means the unit of the FBI that receives telephone or electronic inquiries from FFLs to perform background checks, makes a determination based upon available information as to whether the receipt or transfer of a firearm would be in violation of Federal or state law, researches criminal history records, tracks and finalizes appeals, and conducts audits of system use.

NICS Operations Center's regular business hours means the hours of 9:00 a.m. to 2:00 a.m., Eastern Time, seven days a week.

NICS Representative means a person who receives

telephone inquiries to the NICS Operations Center from FFLs requesting background checks and provides a response as to whether the receipt or transfer of a firearm may proceed or is delayed.

NRI (NICS Record Identifier) means the system-generated unique number associated with each record in the NICS Index.

NTN (NICS Transaction Number) means the unique number that will be assigned to each valid background check inquiry received by the NICS. Its primary purpose will be to provide a means of associating inquiries to the NICS with the responses provided by the NICS to the FFLs.

ORI (Originating Agency Identifier) means a nine-character identifier assigned by the FBI to an agency that has met the established qualifying criteria for ORI assignment to identify the agency in transactions on the NCIC System.

Originating Agency means an agency that provides a record to a database checked by the NICS.

POC (Point of Contact) means a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order.

Proceed means a NICS response indicating that the information available to the system at the time of the response did not demonstrate that transfer of the firearm would violate

federal or state law. A "Proceed" response would not relieve an FFL from compliance with other provisions of Federal or state law that may be applicable to firearms transfers. For example, under 18 U.S.C. 922(d), an FFL may not lawfully transfer a firearm if he or she knows or has reasonable cause to believe that the prospective recipient is prohibited by law from receiving or possessing a firearm.

Record means any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to information that disqualifies the individual from receiving a firearm, and that contains his or her name or other personal identifiers.

STN (State-Assigned Transaction Number) means a unique number that may be assigned by a POC to a valid background check inquiry.

System means the National Instant Criminal Background Check System (NICS).

Sec. 25.3 -- System information.

(a) There is established at the FBI a National Instant Criminal Background Check System.

(b) The system will be based at the Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0147.

(c) The system manager and address are: Director, Federal Bureau of Investigation, J. Edgar Hoover F.B.I. Building, 935 Pennsylvania Avenue, NW, Washington, D.C. 20535.

Sec. 25.4 -- Record source categories.

It is anticipated that most records in the NICS Index will be obtained from Federal agencies. It is also anticipated that a limited number of authorized state and local law enforcement agencies will voluntarily contribute records to the NICS Index. Information in the NCIC and III systems that will be searched during a background check has been or will be contributed voluntarily by Federal, state, local, and international criminal justice agencies.

Sec. 25.5 -- Validation and data integrity of records in the system.

(a) The FBI will be responsible for maintaining data integrity during all NICS operations that are managed and carried out by the FBI. This responsibility includes:

(1) Ensuring the accurate adding, canceling, or modifying of NICS Index records supplied by Federal agencies;

(2) Automatically rejecting any attempted entry of records into the NICS Index that contain detectable invalid data elements;

(3) Automatic purging of records in the NICS Index after they are on file for a prescribed period of time; and

(4) Quality control checks in the form of periodic internal audits by FBI personnel to verify that the information provided to the NICS Index remains valid and correct.

(b) Each data source will be responsible for ensuring the accuracy and validity of the data it provides to the NICS Index and will immediately correct any record determined to be invalid or incorrect.

Sec. 25.6 -- Accessing records in the system.

(a) FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act. FFLs are strictly prohibited from initiating a NICS background check for any other purpose. The process of accessing the NICS for the purpose of conducting a NICS background check is initiated by an FFL's contacting the FBI NICS Operations Center (by telephone or electronic dial-up access) or a POC. FFLs in each state will be advised by the ATF whether they are required to initiate NICS background checks with the NICS Operations Center or a POC and how they are to do so.

(b) *Access to the NICS through the FBI NICS Operations Center.* FFLs may contact the NICS Operations Center by use of a toll-free telephone number, only during its regular business hours. In addition to telephone access, toll-free electronic dial-up access to the NICS will be provided to FFLs after the beginning of the NICS operation. FFLs with electronic dial-up access will be able to contact the NICS 24 hours each day, excluding scheduled and unscheduled downtime.

(c)(1) The FBI NICS Operations Center, upon receiving an FFL telephone or electronic dial-up request for a background check, will:

(i) Verify the FFL Number and code word;

(ii) Assign a NICS Transaction Number (NTN) to a valid inquiry and provide the NTN to the FFL;

(iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and

(iv) Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check:

(A) "Proceed" response, if no disqualifying information was found in the NICS Index, NCIC, or III.

(B) "Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal or state law. A "Delayed" response to the FFL indicates that the firearm transfer should not proceed pending receipt of a follow-up "Proceed" response from the NICS or the expiration of three business days (exclusive of the day on which the query is made), whichever occurs first. (Example: An FFL requests a NICS check on a prospective firearm transferee at 9:00 a.m. on Friday and shortly thereafter receives a "Delayed"" response from the NICS. If state offices in the state in which the FFL is located are closed on Saturday and Sunday and open the following Monday, Tuesday, and Wednesday, and the NICS has not yet responded with a "Proceed" or "Denied" response, the FFL may transfer the firearm at 12:01 a.m. Thursday.)

(C) "Denied" response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. 922 or state law. The "Denied" response will be provided to the requesting FFL by the NICS Operations Center during its regular business hours.

(2) None of the responses provided to the FFL under paragraph (c)(1) of this section will contain any of the underlying information in the records checked by the system.

(d) *Access to the NICS through POCs.* In states where a POC is designated to process background checks for the NICS, FFLs will contact the POC to initiate a NICS background check. Both ATF and the POC will notify FFLs in the POC's state of the means by which FFLs can contact the POC. The NICS will provide POCs with electronic access to

the system virtually 24 hours each day through the NCIC communication network. Upon receiving a request for a background check from an FFL, a POC will:

(1) Verify the eligibility of the FFL either by verification of the FFL number or an alternative POC-verification system;

(2) Enter a purpose code indicating that the query of the system is for the purpose of performing a NICS background check in connection with the transfer of a firearm; and (3) Transmit the request for a background check via the NCIC interface to the NICS.

(e) Upon receiving a request for a NICS background check, POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems, and may provide a unique State-Assigned Transaction Number (STN) to a valid inquiry for a background check.

(f) When the NICS receives an inquiry from a POC, it will search the relevant databases (i.e., NICS Index, NCIC, III) for any matching record(s) and will provide an electronic response to the POC. This response will consolidate the search results of the relevant databases and will include the NTN. The following types of responses may be provided by the NICS to a state or local agency conducting a background check:

(1) No record response, if the NICS determines, through a complete search, that no matching record exists.

(2) Partial response, if the NICS has not completed the search of all of its records. This response will indicate the databases that have been searched (i.e., III, NCIC, and/or NICS Index) and the databases that have not been searched. It will also provide any potentially disqualifying information found in any of the databases searched. A follow-up response will be sent as soon as all the relevant databases have been searched. The follow-up response will provide the complete search results.

(3) Single matching record response, if all records in the relevant databases have been searched and one matching record was found.

(4) Multiple matching record response, if all records in the relevant databases have been searched and more than one matching record was found.

(g) Generally, based on the response(s) provided by the NICS, and other information available in the state and local record systems, a POC will:

(1) Confirm any matching records; and

(2) Notify the FFL that the transfer may proceed, is delayed pending further record analysis, or is denied. "Proceed" notifications made within three business days will be accompanied by the NTN or STN traceable to the NTN. The POC may or may not provide a transaction number (NTN or STN) when notifying the FFL of a "Denied" response.

(h) In cases where a transfer is denied by a POC, the POC should provide a denial notification to the NICS. This denial notification will include the name of the person who was denied a firearm and the NTN. The information provided in the denial notification will be maintained in the NICS Audit Log described in Sec. 25.9(b). This notification may be provided immediately by electronic message to the NICS (i.e., at the time the transfer is denied) or as soon thereafter as possible. If a denial notification is not provided by a POC, the NICS will assume that the transfer was allowed and will destroy its records regarding the transfer in accordance with the procedures detailed in Sec. 25.9.

(i) Response recording. FFLs are required to record the system response, whether provided by the FBI NICS Operations Center or a POC, on the appropriate ATF form for

audit and inspection purposes, under 27 CFR part 178 recordkeeping requirements. The FBI NICS Operations Center response will always include an NTN and associated "Proceed," "Delayed," or "Denied" determination. POC responses may vary as discussed in paragraph (g) of this section. In these instances, FFLs will record the POC response, including any transaction number and/or determination.

(j) *Access to the NICS Index for purposes unrelated to NICS background checks required by the Brady Act.* Access to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purpose of:

(1) Providing information to Federal, state, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives; or

(2) Responding to an inquiry from the ATF in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53).

Sec. 25.7 -- Querying records in the system.

(a) The following search descriptors will be required in all queries of the system for purposes of a background check:

(1) Name;

(2) Sex;

(3) Race;

(4) Complete date of birth; and

(5) State of residence.

(b) A unique numeric identifier may also be provided to search for additional records based on exact matches by the numeric identifier. Examples of unique numeric identifiers for purposes of this system are: Social Security number (to comply with Privacy Act requirements, a Social Security number will not be required by the NICS to perform any background check) and miscellaneous identifying numbers (e.g., military number or number assigned by Federal, state, or local authorities to an individual's record). Additional identifiers that may be requested by the system after an initial query include height, weight, eye and hair color, and place of birth. At the option of the querying agency, these additional identifiers may also be included in the initial query of the system.

Sec. 25.8 -- System safeguards.

(a) Information maintained in the NICS Index is stored electronically for use in an FBI computer environment. The NICS central computer will reside inside a locked room within a secure facility. Access to the facility will be restricted to authorized personnel who have identified themselves and their need for access to a system security officer.

(b) Access to data stored in the NICS is restricted to duly authorized agencies. The security measures listed in paragraphs (c) through (f) of this section are the minimum to be adopted by all POCs and data sources having access to the NICS.

(c) State or local law enforcement agency computer centers designated by a Control Terminal Agency as POCs shall be authorized NCIC users and shall observe all procedures set forth in the NCIC Security Policy of 1992 when processing NICS background checks. The responsibilities of the Control

Terminal Agencies and the computer centers include the following:

(1) The criminal justice agency computer site must have adequate physical security to protect against any unauthorized personnel gaining access to the computer equipment or to any of the stored data.

(2) Since personnel at these computer centers can have access to data stored in the NICS, they must be screened thoroughly under the authority and supervision of a state Control Terminal Agency. This authority and supervision may be delegated to responsible criminal justice agency personnel in the case of a satellite computer center being serviced through a state Control Terminal Agency. This screening will also apply to non-criminal justice maintenance or technical personnel.

(3) All visitors to these computer centers must be accompanied by staff personnel at all times.

(4) POCs utilizing a state/NCIC terminal to access the NICS must have the proper computer instructions written and other built-in controls to prevent data from being accessible to any terminals other than authorized terminals.

(5) Each state Control Terminal Agency shall build its data system around a central computer, through which each inquiry must pass for screening and verification.

(d) Authorized state agency remote terminal devices operated by POCs and having access to the NICS must meet the following requirements:

(1) POCs and data sources having terminals with access to the NICS must physically place these terminals in secure locations within the authorized agency;

(2) The agencies having terminals with access to the NICS must screen terminal operators and must restrict access to the terminals to a minimum number of authorized employees;

and

(3) Copies of NICS data obtained from terminal devices must be afforded appropriate security to prevent any unauthorized access or use.

(e) FFL remote terminal devices may be used to transmit queries to the NICS via electronic dial-up access. The following procedures will apply to such queries:

(1) The NICS will incorporate a security authentication mechanism that performs FFL dial-up user authentication before network access takes place;

(2) The proper use of dial-up circuits by FFLs will be included as part of the periodic audits by the FBI; and

(3) All failed authentications will be logged by the NICS and provided to the NICS security administrator.

(f) FFLs may use the telephone to transmit queries to the NICS, in accordance with the following procedures:

(1) FFLs may contact the NICS Operations Center during its regular business hours by a telephone number provided by the FBI;

(2) FFLs will provide the NICS Representative with their FFL Number and code word, the type of sale, and the name, sex, race, date of birth, and state of residence of the prospective buyer; and

(3) The NICS will verify the FFL Number and code word before processing the request.

(g) The following precautions will be taken to help ensure the security and privacy of NICS information when FFLs contact the NICS Operations Center:

(1) Access will be restricted to the initiation of a NICS background check in connection with the proposed transfer of a firearm.

(2) The NICS Representative will only provide a

response of "Proceed" or "Delayed" (with regard to the prospective firearms transfer), and will not provide the details of any record information about the transferee. In cases where potentially disqualifying information is found in response to an FFL query, the NICS Representative will provide a "Delayed" response to the FFL. Follow-up "Proceed" or "Denied" responses will be provided by the NICS Operations Center during its regular business hours.

(3) The FBI will periodically monitor telephone inquiries to ensure proper use of the system.

(h) All transactions and messages sent and received through electronic access by POCs and FFLs will be automatically logged in the NICS Audit Log described in Sec. 25.9(b). Information in the NICS Audit Log will include initiation and termination messages, failed authentications, and matching records located by each search transaction.

(i) The FBI will monitor and enforce compliance by NICS users with the applicable system security requirements outlined in the NICS POC Guidelines and the NICS FFL Manual (available from the NICS Operations Center, Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0147).

Sec. 25.9 -- Retention and destruction of records in the system.

(a) The NICS will retain NICS Index records that indicate that receipt of a firearm by the individuals to whom the records pertain would violate Federal or state law. The NICS will retain such records indefinitely, unless they are canceled by the originating agency. In cases where a firearms disability is not permanent, e.g., a disqualifying restraining order, the NICS will automatically purge the pertinent record when it is no

longer disqualifying. Unless otherwise removed, records contained in the NCIC and III files that are accessed during a background check will remain in those files in accordance with established policy.

(b) The FBI will maintain an automated NICS Audit Log of all incoming and outgoing transactions that pass through the system.

(1) The Audit Log will record the following information: type of transaction (inquiry or response), line number, time, date of inquiry, header, message key, ORI, and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN). In cases of allowed transfers, all information in the Audit Log related to the person or the transfer, other than the NTN assigned to the transfer and the date the number was assigned, will be destroyed after not more than six months after the transfer is allowed. Audit Log records relating to denials will be retained for 10 years, after which time they will be transferred to a Federal Records Center for storage. The NICS will not be used to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited from receiving a firearm by 18 U.S.C. 922 (g) or (n) or by state law.

(2) The Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system. Searches may be conducted on the Audit Log by time frame, i.e., by day or month, or by a particular state or agency. Information in the Audit Log pertaining to allowed transfers may only be used by the FBI for the purpose of conducting audits of the use and performance of the NICS. Such information, however, may be retained and used as long as

needed to pursue cases of identified misuse of the system. The NICS, including the NICS Audit Log, may not be used by any department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions. The Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of the NICS data.

(c) The following records in the FBI-operated terminals of the NICS will be subject to the Brady Act's requirements for destruction:

(1) All inquiry and response messages (regardless of media) relating to a background check that results in an allowed transfer; and

(2) All information (regardless of media) contained in the NICS Audit Log relating to a background check that results in an allowed transfer.

(d) The following records of state and local law enforcement units serving as POCs will be subject to the Brady Act's requirements for destruction:

(1) All inquiry and response messages (regardless of media) relating to the initiation and result of a check of the NICS that allows a transfer that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions; and

(2) All other records relating to the person or the transfer created as a result of a NICS check that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions.

Sec. 25.10 -- Correction of erroneous system information.

(a) An individual may request the reason for the denial

from the agency that conducted the check of the NICS (the "denying agency," which will be either the FBI or the state or local law enforcement agency serving as a POC). The FFL will provide to the denied individual the name and address of the denying agency and the unique transaction number (NTN or STN) associated with the NICS background check. The request for the reason for the denial must be made in writing to the denying agency. (POCs at their discretion may waive the requirement for a written request.)

(b) The denying agency will respond to the individual with the reasons for the denial within five business days of its receipt of the individual's request. The response should indicate whether additional information or documents are required to support an appeal, such as fingerprints in appeals involving questions of identity (i.e., a claim that the record in question does not pertain to the individual who was denied).

(c) If the individual wishes to challenge the accuracy of the record upon which the denial is based, or if the individual wishes to assert that his or her rights to possess a firearm have been restored, he or she may make application first to the denying agency, i.e., either the FBI or the POC. If the denying agency is unable to resolve the appeal, the denying agency will so notify the individual and shall provide the name and address of the agency that originated the document containing the information upon which the denial was based. The individual may then apply for correction of the record directly to the agency from which it originated. If the record is corrected as a result of the appeal to the originating agency, the individual may so notify the denying agency, which will, in turn, verify the record correction with the originating agency (assuming the originating agency has not already notified the denying agency of the correction) and take all necessary steps to correct the

record in the NICS.

(d) As an alternative to the above procedure where a POC was the denying agency, the individual may elect to direct his or her challenge to the accuracy of the record, in writing, to the FBI, NICS Operations Center, Criminal Justice Information Services Division, 1000 Custer Hollow Road, Module C-3, Clarksburg, West Virginia 26306- 0147. Upon receipt of the information, the FBI will investigate the matter by contacting the POC that denied the transaction or the data source. The FBI will request the POC or the data source to verify that the record in question pertains to the individual who was denied, or to verify or correct the challenged record. The FBI will consider the information it receives from the individual and the response it receives from the POC or the data source. If the record is corrected as a result of the challenge, the FBI shall so notify the individual, correct the erroneous information in the NICS, and give notice of the error to any Federal department or agency or any state that was the source of such erroneous records.

(e) Upon receipt of notice of the correction of a contested record from the originating agency, the FBI or the agency that contributed the record shall correct the data in the NICS and the denying agency shall provide a written confirmation of the correction of the erroneous data to the individual for presentation to the FFL. If the appeal of a contested record is successful and thirty (30) days or less have transpired since the initial check, and there are no other disqualifying records upon which the denial was based, the NICS will communicate a "Proceed" response to the FFL. If the appeal is successful and more than thirty (30) days have transpired since the initial check, the FFL must recheck the NICS before allowing the sale to continue. In cases where multiple disqualifying records are the basis for the denial, the

individual must pursue a correction for each record.

(f) An individual may also contest the accuracy or validity of a disqualifying record by bringing an action against the state or political subdivision responsible for providing the contested information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the contested information be corrected or that the firearm transfer be approved.

Sec. 25.11 -- Prohibited activities and penalties.

(a) State or local agencies, FFLs, or individuals violating this subpart A shall be subject to a fine not to exceed $ 10,000 and subject to cancellation of NICS inquiry privileges.

(b) Misuse or unauthorized access includes, but is not limited to, the following:

(1) State or local agencies', FFLs', or individuals' purposefully furnishing incorrect information to the system to obtain a "Proceed" response, thereby allowing a firearm transfer;

(2) State or local agencies', FFLs', or individuals' purposefully using the system to perform a check for unauthorized purposes; and

(3) Any unauthorized person's accessing the NICS.

28 Code of Federal Regulations § 25.9 (as amended January 22, 2001)[3]

Accordingly, part 25 of title 28 of the Code of Federal Regulations is amended as follows:

PART 25--DEPARTMENT OF JUSTICE INFORMATION SYSTEMS

1. The authority citation for Part 25 continues to read as follows:

Authority: Pub. L. 103-159, 107 Stat. 1536.

Subpart A--The National Instant Criminal Background Check System

Sec. 25.9 [Amended]

2. In Sec. 25.9, paragraph (b) is revised to read as follows:

* * * * *

(b) The FBI will maintain an automated NICS Audit Log of all incoming and outgoing transactions that pass through the system.

(1) The NICS Audit Log will record the following information: type of transaction (inquiry or response), line

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[3] Final rule, National Instant Criminal Background Check System Regulation, 66 F.R. 6470, 6474 (Jan. 22, 2001).

number, time, date of inquiry, header, message key, ORI, and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN). In cases of allowed transfers, all information in the NICS Audit Log related to the person or the transfer, other than the NTN assigned to the transfer and the date the number was assigned, will be destroyed after not more than 90 days after the transfer is allowed. NICS Audit Log records relating to denials will be retained for 10 years, after which time they will be transferred to a Federal Records Center for storage. The NICS will not be used to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited from receiving a firearm by 18 U.S.C. 922 (g) or (n) or by state law.

(2) The NICS Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system. Searches may be conducted on the Audit Log by time frame, i.e., by day or month, or by a particular state or agency. Information in the NICS Audit Log pertaining to allowed transfers may be accessed directly only by the FBI for the purpose of conducting audits of the use and performance of the NICS. Permissible uses include extracting and providing information from the NICS Audit Log to ATF in connection with ATF's inspections of FFL records, provided that ATF destroys the information about allowed transfers within the retention period for such information set forth in paragraph (b)(1) of this section and maintains a written record certifying the destruction. Such information, however, may be retained as long as needed to pursue cases of identified misuse of the system. The NICS, including the NICS Audit Log, may

not be used by any Department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions. The NICS Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of the NICS data.

Supreme Court, U.S.
FILED
MAY 25 2001

No. 00-1332

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL., PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536 (1993), requires the Attorney General to establish a "national instant criminal background check system" (NICS) that federally licensed firearms dealers can contact for information on whether receipt of firearms by prospective transferees would violate 18 U.S.C. 922 or state law. A regulation promulgated by the Attorney General, 28 C.F.R. 25.9(b), provides for the maintenance of an audit log of all incoming and outgoing transactions that pass through the NICS, and for the destruction of that log after no more than six months. The questions presented are:

1. Whether the retention of the NICS audit log concerning allowed firearms transfers for no more than six months is prohibited by Section 103(i) of the Brady Act, 107 Stat. 1542.

2. Whether retaining information concerning allowed firearms transfers in the NICS audit log for a period not to exceed six months is prohibited by 18 U.S.C. 922(t)(2).

3. Whether the court of appeals properly reviewed the Attorney General's regulations interpreting the Brady Act under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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In the Supreme Court of the United States

No. 00-1332

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL., PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 216 F.3d 122. The memoranda and order of the district court (Pet. App. 49a-53a, 54a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on July 11, 2000. The court of appeals denied petitions for rehearing on October 26, 2000 (Pet. App. 45a-46a, 47a-48a). On January 17, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 23, 2001. The petition for a writ of certiorari was filed on

February 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (Brady Act or Act), directs the Attorney General to establish and operate a "national instant criminal background check system" (NICS) that federally licensed firearms dealers can contact, by telephone or other electronic means, for immediate information on whether the receipt of a firearm by a potential transferee would violate 18 U.S.C. 922 or state law. Brady Act § 103(b), 107 Stat. 1541; 18 U.S.C. 922(t)(1); 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999). Because the information contained in the system and query outcomes—*i.e.*, the fact that an individual has something in his history such as a conviction or mental illness that would preclude him from owning a gun—raise both privacy and security issues, Congress directed the Attorney General to issue regulations "to ensure the privacy and security of the information of the [NICS]." Brady Act § 103(h), 107 Stat. 1542.

The Brady Act also restricts the federal government's use and retention of records concerning background checks where the proposed firearms transfers would not violate federal or state law. In particular, the Act provides that, if receipt of a firearm would not violate state or federal law, the system must assign a transaction number to the call, provide that number to the dealer, and "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer." 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999). The Act does

not specify when the records destruction must take place. The version of the Brady bill initially passed by the House of Representatives provided that the system must "immediately destroy all records" of any transactions that are allowed to proceed. See 139 Cong. Rec. H9098, H9123, H9144 (daily ed. Nov. 10, 1993). The House, however, acceded to the Senate version of the destruction requirement, which did not contain the term "immediately." See Pet. App. 10a-11a; see also 18 U.S.C. 922(t)(2)(C).

2. Following notice and comment, the Attorney General promulgated regulations to establish and implement the NICS. See 28 C.F.R. 25.1 *et seq.* At the heart of this lawsuit is the "audit log" regulation, which requires that certain information on NICS transactions, including transfers that are allowed to proceed, be retained in an audit log for a period not to exceed six months. 28 C.F.R. 25.9(b). Information in the audit log is "used to analyze system performance, assist users in resolving operational problems, support the appeals process [concerning denials of firearms transfers], or support audits of the use of the system." 28 C.F.R. 25.9(b)(2); 66 Fed. Reg. 6470, 6474 (2001). Audit log information on allowed transfers "may be accessed directly only by the FBI for the purpose of conducting audits of the use and performance of the NICS." 66 Fed. Reg. at 6472. The Attorney General's regulations expressly prohibit the use of the audit log to establish a federal firearms registry. 28 C.F.R. 25.9(b)(1) and (2). The audit log can be retained no more than six months, after which all information on approved transactions—except the NICS transaction number and the date the transaction number was assigned—must be destroyed.

28 C.F.R. 25.9(b)(1); see 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999).[1]

As the preamble to the Attorney General's regulations explains, the audit log is designed to "satisfy[] the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system." 63 Fed. Reg. 58,303 (1998).

> By auditing the system, the FBI can identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, and protect against the invasions of privacy that would result from such misuse. Audits can also determine whether potential handgun purchasers or [Federal Firearms Licensees or FFLs] have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system. The Audit Log will also allow the FBI to perform quality control checks on the system's operation by reviewing the accuracy of the responses given by the NICS record examiners to gun dealers.

Id. at 58,303-58,304. See also 64 Fed. Reg. 10,262, 10,263 (1999) ("Auditing * * * is essential to safeguard the security and privacy of personal information in the system. The NICS will perform background checks that access a tremendous amount of criminal history, mental health, military background, and other information about individuals. * * * Many businesses and

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[1] Where the information in the audit log is "needed to pursue cases of identified misuse of the system," the data "may be retained and used as" necessary to bring the matter to resolution. 28 C.F.R. 25.9(b)(2).

individuals would be very interested in having easy access to these government databases through FFLs to do employment or other unauthorized checks.").

During the notice and comment period, the Justice Department responded to the claim that 18 U.S.C. 922(t)(2) requires immediate destruction of all records and thus bars the government from retaining a temporary audit log. "Although [Section 922] mandates the destruction of all personally identified information in the NICS associated with approved firearms transactions (other than the identifying number and the date the number was assigned), the statute does not specify a period of time within which records of approvals must be destroyed." 63 Fed. Reg. at 58,303. The Department also rejected the claim that the audit log constituted a federal firearms registry prohibited by Section 103(i) of the Brady Act, 107 Stat. 1542. The records would be retained, the Department explained, only for a limited time and used only for the purposes of ensuring informational privacy and guaranteeing system reliability, accuracy, and integrity. 63 Fed. Reg. at 58,303.

The Attorney General also concluded that the audit log should be destroyed within six months, and that the government should "work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. at 58,304. Consistent with that goal, in January 2001, the Attorney General promulgated amendments to 28 C.F.R. 25.9(b), which would shorten the retention period to 90 days. See 66 Fed. Reg. at 6470, 6474. Those changes were originally to take effect on March 5, 2001, *id.* at 6471, and are currently scheduled to take effect on July 3,

2001, unless further modifications are made. See 66 Fed. Reg. 22,898 (2001).

3. On November 30, 1998, the date on which the audit log regulations first took effect, petitioners filed this action for declaratory and injunctive relief and a writ of mandamus against the Attorney General. Petitioners alleged, *inter alia*, that the temporary retention of an audit log containing NICS records of allowed firearms transfers was inconsistent with the Brady Act. See C.A. App. 17-19. The district court dismissed petitioners' complaint, concluding that "Congress had not spoken directly to the question at issue" and that "defendant's construction of the Brady Law was permissible." Pet. App. 55a.

The court of appeals affirmed. Pet. App. 1a-34a, 43a-44a. The court of appeals first observed that, because petitioners challenge an agency regulation, the case must be analyzed under "the familiar two-part test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Pet. App. 7a. Under *Chevron* step one, the court asks "'whether Congress has directly spoken to the precise question at issue,' for if it has, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 842-843). If the statute is silent or ambiguous with respect to the specific question at issue, the court of appeals explained, it moves to *Chevron*'s second step, "asking 'whether the agency's answer is based on a permissible construction of the statute.'" *Ibid.* (quoting 467 U.S. at 843). At that point, the court "afford[s] substantial deference to the agency's interpretation of statutory language." *Ibid.*

Applying the two-step *Chevron* framework, the court of appeals rejected petitioners' challenges to the

Attorney General's regulations. Pet. App. 7a-34a. Petitioners' first claim was that 18 U.S.C. 922(t)(2) "unambiguously prohibit[s] the Attorney General from retaining information about allowed transactions for any purpose." Pet. App. 7a. Section 922(t)(2), the court agreed, does require the government to "destroy all records of the system" regarding approved transactions, except "the identifying number and the date the number was assigned." *Id.* at 8a. But the court disagreed with petitioners' claim that the statute unambiguously requires destruction to take place immediately. The word "immediately" is not in the statute, *ibid.*, and Congress had declined to adopt a version of the statute that included that term, *id.* at 10a-11a. Moreover, following the Attorney General's promulgation of the audit log regulations, Congress repeatedly declined to amend the statute or pass appropriations legislation that would insert an immediate destruction requirement into the statute. *Id.* at 11a-12a. In light of those considerations, the court concluded that Section 922(t)(2) does not require the immediate destruction of NICS transaction records.

The court of appeals also rejected petitioners' claim that the audit log is inconsistent with Section 103(i) of Brady Act, which is entitled "Prohibition Relating to Establishment of Registration Systems with Respect to Firearms." Subsection 1 of Section 103(i) bars any agency, officer, or employee of the United States from "requir[ing] that any record or portion thereof generated by the [NICS] be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof." 107 Stat. 1542. The audit log regulations, petitioners contended, violate Section 103(i)(1) because log entries constitute "record[s] * * * generated by the" NICS,

and are "recorded at" facilities "owned, managed, or controlled by the United States." The court of appeals disagreed. Section 103(i)(1)'s prohibition on requiring the "record[ing]" of a "record," the court explained, is laden with ambiguity. Pet. App. 13a-14a. As an initial matter, the prohibition could not be read as barring the generation of records in the first instance. Section 922(t)(2)(C) itself speaks of "destroy[ing] all records" relating to allowed transfers, and thus presumes that records will be generated. In addition, the court observed that the prohibition could not be read as categorically banning the government from retaining records for a brief period. Although Section 103(i) bars the government from requiring the recording of "*any*" NICS "record or portion thereof"—and provides no exceptions—other provisions of the Act specifically contemplate that the government would itself record and retain certain NICS records, including records relating to disallowed transfers, see 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999); 107 Stat. 1542, and identification numbers and dates for transactions for allowed transfers, 18 U.S.C. 922(t)(2)(C). See Pet. App. 15a-16a.

In view of those considerations, the court of appeals found the Attorney General's alternative construction of the statute persuasive. Emphasizing the word "require," the Attorney General had interpreted the statute as barring the government from requiring third parties, such as firearms dealers, from recording information at a federal or state government facility. Pet. App. 16a. If Congress had intended Section 103(i) to bar the Attorney General from recording or retaining information, the court of appeals explained, it would not have barred government agencies, officers, and employees from "*requir[ing]* that any record or portion thereof generated by the [NICS] *be* recorded."

Brady Act § 103(i)(1), 107 Stat. 1542 (emphasis added). Instead, Congress would have barred government agencies, officers, and employees from "*record[ing]*" or making a "record" of the NICS transaction. Pet. App. 16a.

The court of appeals also rejected petitioners' claim that the audit log violates subsection 2 of Section 103(i), which bars government agencies and officials from "us[ing] the [NICS] to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect" to individuals who are barred from receiving firearms. Pet. App. 17a. The audit log, the court observed, is not a "system for the registration of firearms, firearm owners, or firearms transactions or dispositions." *Ibid.* It does not retain the names and personal information of gun purchasers indefinitely, or for purposes of tracking those individuals. Instead, it permits certain information to be retained for a limited period of time for the sole and exclusive purposes of "protecting the privacy of the NICS and for quality control." *Ibid.* (internal quotation marks omitted). The audit log, moreover, contains a maximum of six months' transactions, a snapshot that "reveals virtually nothing about the universe of firearms owners in the United States." *Ibid.* Indeed, the court of appeals continued, the audit log stands in contradistinction to other databases that constitute registration systems, like the central registry of machine guns established by the National Firearms Act. While the machine gun registry contains extensive information about the individuals with the weapons and the weapons themselves, the audit log contains little information, does not indicate if the proposed buyer completed the transaction, and is purged every six months. *Id.* at 18a.

The court of appeals also concluded that the Attorney General's audit log regulations reasonably implemented the Brady Act's requirements. Pet. App. 18a-34a. The Brady Act itself, the court observed, directed the Attorney General to issue regulations "to ensure the privacy and security of the information of the [NICS]." *Id.* at 23a (quoting Brady Act § 103(h), 107 Stat. 1542). Audits, the court agreed, serve that goal by ensuring that the system's confidential information is not used for unauthorized purposes. *Id.* at 23a-24a. The court also noted that the audit log regulations were consistent with the Act's legislative history, which evidenced Congress's concern about the invasion of privacy that could result from unauthorized use. See *id.* at 24a (quoting 139 Cong. Rec. S16,326, S16,327 (daily ed. Nov. 19, 1993) (statement of Sen. Leahy)). In addition, the court of appeals agreed that the audit log helps ensure that the system is "working" properly, *id.* at 21a, and providing "accurate" responses, *id.* at 22a. The need for an audit log, the court of appeals also noted, is supported by the fact "that auditing is not unusual for computerized systems like the NICS." *Id.* at 23a.

Judge Sentelle dissented. Pet. App. 34-42a. The Attorney General, he declared, had "not only exceeded the authority granted her under [18 U.S.C. 922(t)(2)], but ha[d] also violated express prohibitions of other statutory sections." Pet. App. 35a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. The Brady Handgun Violence Prevention Act (Brady Act or Act), Pub. L. No. 103-159, 107 Stat. 1536

(1993), requires the Attorney General to establish an effective national instant criminal background check system (NICS). The Act requires the Attorney General "to ensure the privacy and security of the information of the [NICS]," Brady Act § 103(h), 107 Stat. 1542, and specifies that the Attorney General must destroy records of allowed firearms transfers, 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999). The Attorney General's audit log regulations—which require both temporary retention of certain information for a brief period and the information's complete destruction after that period—are consistent with the Brady Act.

As the preamble to the Attorney General's regulations makes clear, the audit log is designed to "satisfy[] the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system." 63 Fed. Reg. 58,303 (1998). By auditing the system, the government "can identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, and protect against the invasions of privacy that would result from such misuse." *Ibid.* The need for such protection is particularly great given the confidential and valuable information the system provides. As the Attorney General explained:

> Auditing the users * * * of the NICS is essential to safeguard the security and privacy of personal information in the system. The NICS will perform background checks that access a tremendous amount of criminal history, mental health, military background, and other information about individuals. * * * Without the capacity to audit the use of the system, there will be no way of determining whether [Federal Firearms Licensees or

> FFLs] are requesting checks for purposes other than checking on the background of a prospective gun purchaser. Many businesses and individuals would be very interested in having easy access to these government databases through FFLs to do employment or other unauthorized checks.

64 Fed. Reg. 10,262, 10,263 (1999).

The audit log, moreover, helps ensure that information provided by the system is accurate. 63 Fed. Reg. at 58,303-58,304. Decisions to allow a firearm purchase are not fully automated, and thus require officials to review and evaluate records before making a decision. See C.A. App. 110. Review of decisions made by NICS examiners is necessary to ensure that the responsible individuals make correct decisions on whether a transfer is permissible, and to enable supervisors to provide additional training where necessary. See *id.* at 110-111; 63 Fed. Reg. at 58,303-58,304. Audits can also help determine "whether potential handgun purchasers or FFLs have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system." 63 Fed. Reg. at 58,303-58,304. Finally, audits are vital to ensuring that the system (including its software) is working properly from a technical standpoint. See 28 C.F.R. 25.9(b)(2); C.A. App. 107-108. The FBI has estimated that 98% of system inquiries result in approval of firearms transactions. C.A. App. 112; see also *id.* at 109. As the court of appeals recognized, "Congress, having directed the Attorney General to establish a system for preventing disqualified persons from purchasing firearms, would expect the Attorney General to ensure that the system produces accurate information and guards against misuse." Pet. App. 32a.

Consistent with those limited goals, the Attorney General's regulations provide that the audit log can be used only to "satisfy[] the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system." 63 Fed. Reg. at 58,303. See also 66 Fed. Reg. 6470, 6471 (2001) ("The temporarily retained information on approved firearm transfers is used only for purposes related to discovering misuse or avoidance of the system or ensuring the proper operation of the system."). The Attorney General, moreover, is committed to "reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. at 58,304. In January 2001, the Attorney General promulgated an amendment that, absent further modifications, would shorten the retention period to 90 days. 66 Fed. Reg. at 6470, 6474. That change was originally to take effect on March 5, 2001, *id.* at 6471, and is currently scheduled to take effect on July 3, 2001, 66 Fed. Reg. 22,898 (2001).

2. Petitioners contend that the Attorney General's audit log regulations are inconsistent with the text of the Brady Act. Pet. 8-18. That claim lacks merit, and was properly rejected by the court of appeals.

a. Petitioners first assert that the audit log regulations conflict with Section 103(i) of the Brady Act, 107 Stat. 1542. Petitioners' argument proceeds from the premise that Section 103(i)(1), by its terms, prohibits any NICS record of an allowed transfer from being "'Recorded at or Transferred to' a Government Facility." Pet. 9. However, as the court of appeals recognized (Pet. App. 16a), that is not what Section 103(i)(1) says. Section 103(i) does not prohibit the government or its agents from *recording* NICS records at a government facility. It bars the government and its

agents from "*requir[ing]* that any record or portion thereof generated by the system * * * *be recorded* at or transferred to" such a facility. 107 Stat. 1542 (emphasis added). In light of Congress's use of the word "require," the Attorney General could properly understand Section 103(i)(1) as addressing what the Attorney General and other government officials or agencies may require *third parties* to do with records generated by the NICS. See Pet. App. 16a; see also 66 Fed. Reg. at 6473. In other words, the provision prohibits the Attorney General from imposing additional reporting requirements on firearms dealers, requirements that could be used to centralize the records of dealers and establish a federal firearms registry.

Petitioners' proposed construction of Section 103(i)(1), by contrast, effectively excises the word "require" from Section 103(i)(1). If the statute had been designed to bar the government and its agents from retaining certain records, presumably it would have prohibited the government and its agents from "recording" NICS records at or "transferring" them to government facilities; it would not have barred the government and its agents from "*requiring*" that records "*be* recorded at or transferred to" such facilities. It is, of course, inappropriate to adopt a construction of a statute that renders one of its terms superfluous. See *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant" (internal quotation marks omitted)); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (court must give effect to

every clause and word of a statute); *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) (similar).[2]

Petitioners' construction, moreover, would place Section 103(i)(1) in conflict with other provisions of the Brady Act. As the court of appeals explained (Pet. App. 15a-16a), Section 103(i)(1)'s prohibition extends—without exception—to "any record or portion thereof generated by" the NICS. Consequently, if petitioners' construction were correct, Section 103(i)(1) would bar the government from recording *any* NICS-generated record. Such a prohibition would conflict with the Brady Act's express recognition that the government can record and permanently retain certain NICS-generated records, including records relating to disapproved transactions, 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999), and the transaction number and date of approved transfers, 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999); 107 Stat. 1542. Recognizing that conflict, petitioners argue that the court of appeals should have "harmonize[d]" Section 103(i)(1) with the rest of the statute by, in effect, judicially transplanting exceptions into Section 103(i)(1), notwithstanding the fact that those exceptions do not appear in Section 103(i)(1) itself. Pet. 11. Such judicial surgery to statutory text, however, cannot be justified under the guise of "harmoniz[ing]" otherwise conflicting statutory

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[2] Petitioner contends that the Attorney General's construction of the word "require" was "nothing more than an agency's convenient litigating position." Pet. 12 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)). Even if that were true, it is irrelevant; the court of appeals accorded the Attorney General no deference in determining whether or not the statute directly spoke to that issue. See Pet. App. 16a ("[W]e owe no deference to the Attorney General's interpretation of statutory language at this stage of *Chevron* analysis.").

provisions where, as here, an alternative construction eliminates the conflict among the statutory provisions while giving effect to each word and phrase in the statute.[3]

b. Alternatively, petitioners contend (Pet. 13-15) that the Attorney General's audit log regulation violates Section 103(i)(2) of the Brady Act, 107 Stat. 1542. Section 103(i)(2) provides that NICS records may not be used by federal departments, agencies, officers or employees to "establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code

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[3] To the extent petitioners suggest (Pet. 12) that the court of appeals' decision conflicts with *National Rifle Ass'n* v. *Brady*, 914 F.2d 475, 483-484 (4th Cir. 1990), cert denied, 499 U.S. 959 (1991), that claim is without merit. In that case, the court of appeals upheld certain regulations promulgated by the Bureau of Alcohol, Tobacco and Firearms under the Firearms Owners' Protection Act, Pub. L. No. 99-308, 18 U.S.C. 921 *et seq.*, but rejected two requirements as inconsistent with the statute. One of the statutory provisions at issue there, 18 U.S.C. 923(c), provided for certain recordkeeping requirements, but specifically declared that "no other recordkeeping shall be required." 914 F.2d at 483. In light of that express prohibition and other statutory provisions, the court of appeals invalidated regulatory recordkeeping requirements that, in the court's view, were not contemplated by the statute. *Id.* at 483-484. Here, however, the statute does not expressly preclude the agency from retaining NICS-generated records. To the contrary, as explained above, it specifically contemplates that certain records will be retained. Moreover, as also explained above, the statute by its terms merely bars the government from *requiring others* to retain records. In that respect, the *NRA* case *supports* the court of appeals' construction of the statute: In both this case and that one, Congress was concerned with the information the agency might require *others* to record.

or state law, from receiving a firearm." The Attorney General's audit log, however, is not a registration system. To the contrary, the regulations expressly provide that "[t]he NICS, including the NICS Audit Log, may not be used by any department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions." 28 C.F.R. 25.9(b)(2).

The information contained in the audit log, moreover, cannot be readily transformed into a federal firearms registry. As the court of appeals explained (Pet. App. 18a), the audit log "includes no addresses of persons approved to buy firearms, nor any information on specific weapons, nor even whether approved gun purchasers actually completed a transaction." The contents of the audit log are "routinely purged," and never contain information on more than six months of proposed transactions. *Ibid.* Thus, unlike the registry of machine guns established under the National Firearms Act—a comprehensive list of persons entitled to possess machine guns and certain other firearms, see 26 U.S.C. 5841—the audit log "represents only a tiny fraction of the universe of firearm owners." Pet. App. 18a. Finally, unlike the machine gun registry, the audit log may be used only for the purpose of monitoring the use and performance of the NICS itself. 28 C.F.R. 25.9(b)(2).

3. The court of appeals also correctly rejected petitioners' contention (Pet. 18-22) that 18 U.S.C. 922(t)(2) requires the *immediate* destruction of NICS records concerning allowed firearms transfers. See Pet. App. 8a-12a. Section 922(t)(2) does require that NICS records on allowed transfers (except the transaction number and date) be destroyed, but it is silent as to the timing of that destruction; the requirement of

"immediate" destruction that petitioners insist on does not appear in the statute itself. Accordingly, the Attorney General reasonably concluded that the Act permits the destruction of NICS records after a brief period where that brief retention period helps ensure that the NICS system is working properly and being used lawfully. As the court of appeals observed, "Congress, having directed the Attorney General to establish a system for preventing disqualified persons from purchasing firearms, would expect the Attorney General to ensure that the system produces accurate information and guards against misuse." *Id.* at 32a. The audit log regulations—by specifying a retention period that is "the minimum reasonable period for performing audits [of] the system" to ensure accuracy and detect privacy-invading misuse—is consistent with both that expectation and the statutory mandate of records destruction. 63 Fed. Reg. at 58,304.

The validity of the Attorney General's interpretation is underscored by the fact that Congress has repeatedly, both before and after passage of the Brady Act, declined to impose an immediate destruction requirement. See Pet. App. 10a-12a. As the court of appeals observed, Congress's failure to retain the immediate destruction requirement that appeared in the House version of the Brady Act strongly supports the conclusion that Congress's intent "is at least ambiguous." *Id.* at 11a. Congress knew how to mandate immediate destruction—by placing the word "immediately" before "destroy" in statutory text—and the House version of the Brady Act did so. But the statute that Congress actually enacted and that the President signed into law, in compliance with the requirements Article I, Section 7, Clause 2 of the Constitution, did not include that language. Congress, moreover, repeatedly has rejected

efforts to re-insert immediate destruction (or near-immediate destruction) requirements after the Act's passage, including after the Attorney General's promulgation of the audit log regulations. See *id.* at 10a-12a. That too is consistent with the court of appeals' conclusion that there is no "unambiguous congressional intent to require immediate destruction of NICS records." *Id.* at 12a.[4]

Contrary to petitioners' contention (Pet. 20), an interim provision of the Brady Act requiring that records of approved transactions be destroyed within 20 days, 18 U.S.C. 922(s)(6)(B)(i), does not undermine the validity of the Attorney General's audit log regulation. The interim provision governed background checks performed before the establishment of the automated NICS. The audit log was created to protect the security of the new automated system and ensure its proper operation. To the extent the former 20-day deadline is relevant at all, it proves that Congress knew how to

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[4] For that reason, petitioners err in relying (Pet. 24-25) on Section 621 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (OCESAA), Pub. L. No. 105-277, 112 Stat. 2681-116. Section 621 prohibited the use of appropriated funds for "any system to implement 18 U.S.C. 922(t) that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm." OCESAA § 621(2), 112 Stat. 2681-116; see also Act of Dec. 21, 2000, Pub. L. No. 106-553, Appendix B—H.R. 5548, § 618, 114 Stat. 2762A-252. But that provision, like 18 U.S.C. 922(t), does not specify when destruction of the referenced records must take place. See Pet. App. 11a. As the court of appeals noted, Congress considered but did not enact an appropriations rider that "would have conditioned NICS funding on the 'immediate destruction of all information' relating to persons eligible to possess firearms." *Ibid.* (quoting 144 Cong. Rec. S8680 (daily ed. July 21, 1998)).

include express deadlines for records destruction, but did not do so here. Nor did Congress otherwise foreclose the Attorney General from establishing an audit log to ensure that the automated NICS is functioning properly and is not subject to misuse.

4. Finally, petitioners argue (Pet. 26-30) that the court of appeals should not have relied on the traditional two-step analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, petitioners contend, the court of appeals should have relied on this Court's decision in *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). That argument is without merit. As an initial matter, in *Brown & Williamson*, this Court itself applied the traditional two-step approach of *Chevron*. "Because this case involves an administrative agency's construction of a statute that it administers," the Court explained, "our analysis is governed by *Chevron*." *Id.* at 132. Applying the first step of *Chevron*, the Court determined that Congress in fact had spoken to the question there, which was whether the FDA had authority to regulate tobacco. Carefully canvassing the political history of tobacco, the Court concluded that Congress's actions over the previous 35 years "preclude an interpretation of the" Food, Drug, and Cosmetic Act "that grants the FDA jurisdiction to regulate tobacco products." *Id.* at 155. The Court took careful note that, throughout most of the FDA's history, the FDA had disavowed any authority to regulate tobacco. The Court concluded that Congress, by passing a host of tobacco-specific laws following the FDA's disavowal, and by acting to preclude any agency from exercising regulatory control over tobacco, had "effectively ratified the FDA's

previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

To be sure, the Court in *Brown & Williamson* also observed that its inquiry into whether Congress had spoken directly to the issue was "shaped, at least in some measure, by the nature of the question presented." 529 U.S. at 159. In "extraordinary cases," the Court explained, "there may be reason to hesitate before concluding that Congress has intended" an "implicit delegation" of power to regulate a certain segment of the economy. *Ibid.* In the context of tobacco, the Court explained, the unique political history of the product, the distinct regulatory scheme governing it, Congress's repeated rejections of proposals to allow the FDA to regulate tobacco, and Congress's repeated actions to preclude regulation of tobacco, all provided reason to hesitate:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the [FDA's] expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Id. at 159-160.

Brown & Williamson, as the above description attests, has no application here.[5] This is not an "extraordinary case[]" in which the agency, for the previous 35 years, disavowed power to regulate a particular product under the statutory provisions at issue. It is not a case in which Congress effectively ratified the agency's disavowal; in which Congress repeatedly rejected proposals that would have empowered the agency to regulate; or in which Congress adopted proposals that created a distinct regulatory regime for the product at issue, only to have the agency later change its view. Instead, this is a case in which Congress explicitly delegated to the Attorney General authority to create a national instant criminal background check system, ordered the Attorney General to promulgate regulations to safeguard that system, and *rejected* statutory language that would have precluded or overturned the regulations that petitioners now challenge.[6] Because nothing in the Act bars the

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[5] In addition, it is far from clear that any question concerning the applicability of *Brown & Williamson* is properly presented by this case. Petitioner relies on *Brown & Williamson* for the proposition that *Chevron* deference is inappropriate. On most of the issues petitioners raise, however, the court of appeals accorded the agency no deference. See Pet. App. 16a; note 3, *supra*.

[6] Much of petitioners' efforts to render this case "extraordinary" rest on the false premise that the audit log is a system for gun registration. See Pet. 16-17. As shown above, it is not. See pp. 16-17 *supra*. Petitioners, moreover, blink reality when they assert that, "[g]iven the always visible and sometimes rancourous debate" on firearms issues, the Attorney General's ability to retain an audit log is hardly "a detail that Congress would have implicitly delegated to the agency." Pet. 27-28. Contrary to petitioners' assumption, it is sometimes precisely where Congress cannot itself resolve an issue related to the administration of a new system—whether because of rancor or in-

Attorney General from promulgating the regulations at issue here, the court of appeals did not err in upholding them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sufficient facts—that Congress declines to speak to the question and instead delegates to an agency the responsibility of filling the statutory gap in light of its expertise and experience. Whether and to what extent the Attorney General may need to retain a temporary audit log to ensure system integrity is precisely the sort of issue one might expect Congress to leave to the Attorney General for resolution.

(3)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,
LAW ENFORCEMENT ALLIANCE OF AMERICA, INC.,
JANE DOES I and II, and JOHN DOES I, III, and IV
Petitioners

v.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

1. Section 103(i)(1) of the Brady Act provides that no federal agency may "require that any record or portion thereof generated by the system established under this section be recorded at or transferred to" a government facility. The records thus protected are those "generated by the system," i.e., the records the dealer transmits to the NICS for an instant background check and which the regulation at issue directs shall be recorded as an "audit log."

Ignoring that § 103(i) addresses the records "generated by the system," Respondent asserts that "the provision prohibits the Attorney General from imposing additional reporting requirements on firearms dealers," which could be used to "establish a federal firearms registry." Br. 14. It is unclear why such "additional" records would be more susceptible to use for a registry than would the NICS-generated records kept by the government. But the argument is foreclosed by the fact that § 103(i) prohibits recordation of the records "generated by the system," the very records which compose the "audit log."

Respondent argues: "Section 103(i) does not prohibit the government or its agents from *recording* NICS records at a government facility."[1] Br. 13. The drafters beg to differ: "This legislation would prevent any Department, agency,

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[1] "The statute does not expressly preclude the agency from retaining NICS-generated records. . . . [T]he statute by its terms merely bars the government from *requiring others* to retain records." Br. 16 n.3. In other words, a statute which prohibits the government from retaining certain records is transformed into one which prohibits anyone but the government from retaining the records.

officer, or employee of the United States from compiling or recording any record obtained through the instantaneous check." 139 Cong. Rec. H2829 (May 8, 1991) (Armey-Staggers colloquy). Nothing about the word "require" prevents the prohibition on recordation from applying to the government, for the Attorney General through the regulation is "requir[ing] that any record or portion thereof generated by the system established under this section be recorded at" the NICS facility by NICS employees.

According to Respondent, the word "require" means that § 103(i) only bars "the government from requiring third parties, such as firearms dealers, from recording information at a federal or state government facility." Br. 8. This oddly presupposes that a dealer would have access to the government facility and is prohibited from recording information in the government computers.[2]

To be sure, § 103(i) prohibits the Attorney General from "requiring" anyone (whether government employee or dealer) to "transfer" NICS-generated records to a government facility -- with the obvious exception that information is transmitted by the dealer for the instant check and is destroyed on approval of

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[2] *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), invalidated a BATF regulation about dealers with the words, "Congress could hardly have been more clear in its direction that 'no other recordkeeping shall be required.'" Respondent denies any parallel between this sweeping language and § 103(i), but then suggests that the substance is the same: "In both this case and that one, Congress was concerned with the information the agency might require *others* to record." Br. 16 n.3. Yet the statute in *NRA v. Brady* explicitly prohibited the agency from requiring other recordkeeping of dealers, while the statute here makes no reference to any third parties.

the transfer. The regulation violates this prohibition by requiring the dealer to transfer such records to a government facility for an extraneous purpose – the creation and maintenance of investigative files euphemistically termed an "audit log."

By prohibiting the Attorney General from "requiring" the transfer to or recordation of records at a government facility, the Act prohibits requiring either dealers *or* government employees to participate in the amassing of information on lawful transferees at a government facility. No amount of semantics about the word "require" can disguise the fact that the Attorney General, through the regulation, is "requiring" dealers to "transfer" records "generated by the system" to a government facility for use as an "audit log" for six months (not just for an instant check) and is "requiring" NICS employees to "record" the information in the audit log.

Respondent sees § 103(i) as "laden with ambiguity" because the Act includes exceptions. Br. 8, citing panel decision. These exceptions include records on disallowed transfers as well as the identification numbers and dates of allowed transfers. Yet the very listing of those exceptions demonstrates what is not excepted from the destruction requirement – records on the identity of approved transferees.

"A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole . . . .'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1300-01 (2000). Respondent argues that harmonization here would require "judicially transplanting exceptions" because

"those exceptions do not appear in Section 103(i)(1) itself." Br. 15. Yet Congress may enact a statute with a general rule in one section and exceptions in other sections.[3] Respondent's "alternative construction" which "eliminates the conflict" is nothing more than "appellate counsel's post hoc rationalizations," *Motor Vehicle Mfrs. Assn. v. State Farm Mutual*, 463 U.S. 29, 50 (1983).

Respondent otherwise makes policy arguments that should be made to Congress, not to this Court. Respondent claims that, without the "audit log," there is no way to guarantee that dealers are not requesting background checks for improper purposes. Br. 11-12. No supporter of the Brady Act suggested such a hypothesis. Instead, its proponents explained that if the government is allowed to keep NICS records, there is no way of guaranteeing that the government will not use the records other than for the determination of whether a transferee has a legal disability. Record destruction provides an institutional barrier to guarantee that the government makes no other use of the records. The Act relies on structural checks-and-balances, not on lofty declarations in regulations, to prevent governmental misuse of information.

Respondent gives reason after reason why the records are supposedly needed,[4] Br. 11-12, but the argument is really a

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[3] "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957).

[4] For instance, supervisors must conduct spot checks to ensure that examiners have made the right decisions. This after-the-fact "audit"

list of excuses about why the Attorney General did not wish to operate NICS in the manner mandated by Congress. The criminal code punishes the making of false statements, which Congress intended to be ferreted out using traditional law enforcement methods.[5] Nullifying statutory provisions intended to protect privacy under the plea of "necessity" is no more legitimate than are Fourth Amendment violations committed in the purported interest of law enforcement.

2. Section 103(i)(2) provides that no federal agency shall "use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions, except with respect to" persons who are prohibited by law from receiving firearms. The character of the "audit log" as a registration system according to ordinary linguistic usage is not ameliorated by the regulation's Orwellian self-declaration that the "audit log" registry of firearm owners may not be used to establish a registry of firearm owners. Br. 17, quoting 28 C.F.R. § 25.9(b)(2).

The statute prohibits registration of "firearm owners, or firearm transactions," but Respondent claims no violation exists

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allows mistakes to be made and firearms to be transferred unlawfully. Spot checks conducted while the examiner is making the decision would prevent such mistakes and remove any supposed need for an "audit log."

[5] While chanting the mantra "audit," the actual use of the registry is said to be the enforcement of Gun Control Act prohibitions on false statements. However, Congress did not intend that the FBI use NICS records to investigate already-approved transferees, and the FBI has no lawful power to inspect dealer records, *see United States v. Biswell*, 406 U.S. 311, 315 (1972) ("the legality of the search depends . . . on the authority of a valid statute").

because addresses are not required. Br. 17. Surely "firearm owners" are identified by name, sex, race, date of birth, and State of residence, all of which NICS requires, together with permissible requests of one's Social Security number, military number, height, weight, eye and hair color, and place of birth. 28 C.F.R. § 25.7. The fact that the identities of all firearm owners or transactions are not permanently kept does not mean that the Log, during the time it is maintained, is not "a record or list of names . . . kept by an official appointed to do so." *Webster's New World Dictionary* 1130 (1988) (defining "register").[6]

3. Section 922(t)(2), 18 U.S.C., provides that if receipt of a firearm would not violate the law, the system shall:

> (A) *assign* a unique identification number to the transfer;
>
> (B) *provide* the licensee with the number; and
>
> (C) *destroy* all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer. (Emphasis added.)

Respondent relies on lack of the word "immediate,"[7] Br.

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[6] Respondent writes that "unlike the machine gun registry, the audit log may be used only for" specified purposes. Br. 17. Actually, machine gun registration records are tax records strictly protected from disclosure by the tax privacy provisions of 26 U.S.C. § 6103.

[7] "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S.

18-19, yet ignores the unqualified nature of the command to "destroy" and the irreconcilability thereof with its antonym, "maintain." *See* 28 C.F.R. § 25.9(b) ("the FBI will maintain an automated NICS Audit Log"). Once the transferee passes the instant check, Congress delegated no authority to the Attorney General to do anything with the records other than to "destroy" them.

The Act's Interim Provision granted a 20-day grace period for destruction of the background-check records by local law enforcement. 18 U.S.C. § 922(s)(6)(B)(i). Respondent argues that "Congress knew how to include express deadlines," Br. 19-20, but ignores that, without an explicit grace period, the term "destroy" on its face negates any act of retention.

4. Petitioners do not argue, as Respondent suggests, that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable. Br. 20-21. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), refined the *Chevron* test to explain that, even in the absence of statutory clarity, the courts should not recognize an implied delegation of power to an agency where the issue is of great public magnitude. "Congress could not have intended to

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1, 6 (1997). Even if it is considered, no one contradicted Senator Craig's explanation of the Senate version, which did not include the word "immediate," thus: "It is a matter of law that they [the records] should not stand once the background check is done, so that there not be a fear that somebody were compiling a master list of guns and gunowners." 139 Cong. Rec. S16328 (Nov. 19, 1993). "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin Sng, Inc.*, 426 U.S. 548, 564 (1976).

delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[8] *Id.* at 1315.

Again and again, decade after decade, Congress has rejected the concept that the government keep any lists of lawful owners of firearms. The privacy provisions at issue here join a long line of other provisions with the same fundamental objective. Like tobacco, the firearms issue "has its own unique political history," and "we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny . . . this power."[9] *Id.*

The Brady Act was an historic compromise in which law-abiding firearm owners would submit to a background check in exchange for the promise that the government would not keep any records on their identities.[10] The very suggestion

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[8] "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.* at 1314, quoting Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

[9] Respondent states that the court of appeals accorded the agency no deference on most issues, Br. 22 n.5, but the court stated: "[B]ecause the statute nowhere identifies precisely whose privacy interests are protected, we defer to the Attorney General's interpretation . . . ." App. 24a.

[10] Enactment of § 103(i) guaranteed that the Brady bill would not "authorize the Federal Government to compile a database of firearm purchase using information collected through the instantaneous computer check." 135 Cong. Rec. H2828-29 (May 8, 1991) (Armey-Staggers colloquy). "The amendment specifically prohibits keeping any records about lawful sales." *Id.* at S8934 (June 27, 1991) (statement of Senator Stevens). "This instant check system will be used by licensed dealers to

that the government could keep records on firearm owners for such duration as the Attorney General pleased would have wrecked passage of the Act. Yet Respondent embraces the "implicit delegation" argument and finds this to be a case where "Congress declines to speak to the question and instead delegates to an agency the responsibility of filling the statutory gap . . . ." Br. 22-23 n.6.

However, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S. Ct. 903, 909-10 (2001). There, this Court "refused to find implicit in ambiguous sections of the CAA [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted." 121 S. Ct. at 909-10. Here, the Act explicitly prohibits retaining records on lawful transferees and expressly grants the power to retain records on denied transferees. And here, as in *American Trucking*, "the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." *Id.* at 916-17. An agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* at 918-19.

Like *Brown & Williamson*, this Court's decision in *American Trucking* disdains implied or cryptic delegations of power involving issues of great significance:

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check the eligibility of purchasers of all firearms and no records of legitimate purchasers may be kept." *Id.* at S9080 (June 28, 1991) (statement of Senator Thurmond).

> We find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards. . . . "The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity."

Id. at 910, quoting *Christensen v. Harris County*, 529 U.S. 576, 590, n. (2000) (Scalia, J., concurring).

The decision of the court below is in conflict with the above fundamental principles. Granting this petition for certiorari would give this Court an opportunity to develop further its jurisprudence concerning the presumption against "cryptic delegations" as well as to correct a decision that adversely affects the privacy rights of millions of Americans.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

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